NO. 2011-1921

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-530885

STATE OF OHIO

Plaintiff-Appellee,

-vs-

ANTHONY SOWELL

Defendant-Appellant

MERIT BRIEF OF APPELLEE STATE OF OHIO

Counsel for Plaintiff-Appellee

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR
KATHERINE MULLIN (0084122)
KRISTEN SOBIESKI (0071523)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 698-7919

Counsel for Defendant-Appellee

JEFFREY M. GAMSO, ESQ.
1119 Adams St., 2nd Floor
Toledo, OH 43604
(419) 213-3800

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: ERIKA CUNLIFFE, Esq.
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44114
(216) 443-7583

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

On December 1, 2009, the Cuyahoga County grand jury returned an 85-count indictment against Anthony Sowell for the murders of the 11 women whose bodies were found in and around his Imperial Avenue home, and the attempted murders of 3 additional women (Latundra Billups, Gladys Wade, and Shawn Morris).[1] Each of the 22 counts of Aggravated Murder carried 13 course-of-conduct specifications and 2 felony murder specifications, making Sowell eligible for the death penalty.

Judge Timothy J. McGinty originally presided over the case for roughly a week before voluntarily recusing himself. Judge Shirley Strickland Saffold then had the case from December 11, 2009 until this Court's order on or about April 22, 2010. Judge Dick Ambrose then assumed the role of presiding judge.

On June 3, 2011, a jury trial commenced. At the close of the State's case, the trial court granted Sowell's Rule 29 motion for judgment of acquittal as to 3 counts: the Aggravated Murder of Leshanda Long under R.C. 2903.01(B) contained in Count 38, as well as both charges of Kidnapping related to Leshanda Long contained in Counts 39 and 40. On July 22, 2011, the jury returned a verdict of guilty on all remaining counts and specifications except for the Aggravated Robbery contained in Count 85. The jury found Sowell guilty of the following:

---

[1] Tanja Doss and Vanessa Gay did not come forward until after the December 1 indictment. The grand jury returned indictments relating to the separate attacks on Doss and Gay afterwards, and they testified as other acts witnesses at Sowell's trial.

Victim name	Guilty verdicts related to the victim
Tonia Carmichael	Count 1 – Aggravated Murder, R.C. 2903.01(A) Count 2 – Aggravated Murder, R.C. 2903.01(B) Count 3 – Kidnapping, R.C. 2905.01(A)(3) Count 4 – Kidnapping, R.C. 2905.01(A)(4) Count 5 – Abuse of a Corpse, R.C. 2927.01(B) Count 6 – Tampering with Evidence, R.C. 2921.12(A)
Nancy Cobbs	Count 7 – Aggravated Murder, R.C. 2903.01(A) Count 8 – Aggravated Murder, R.C. 2903.01(B) Count 9 – Kidnapping, R.C. 2905.01(A)(3) Count 10 – Kidnapping, R.C. 2905.01(A)(4) Count 11 – Abuse of a Corpse, R.C. 2927.01(B) Count 12 – Tampering with Evidence, R.C. 2921.12(A)
Tishana Culver	Count 13 – Aggravated Murder, R.C. 2903.01(A) Count 14 – Aggravated Murder, R.C. 2903.01(B) Count 15 – Kidnapping, R.C. 2905.01(A)(3) Count 16 – Kidnapping, R.C. 2905.01(A)(4) Count 17 – Abuse of a Corpse, R.C. 2927.01(B) Count 18 – Tampering with Evidence, R.C. 2921.12(A)
Crystal Dozier	Count 19 – Aggravated Murder, R.C. 2903.01(A) Count 20 – Aggravated Murder, R.C. 2903.01(B) Count 21 – Kidnapping, R.C. 2905.01(A)(3) Count 22 – Kidnapping, R.C. 2905.01(A)(4) Count 23 – Abuse of a Corpse, R.C. 2927.01(B) Count 24 – Tampering with Evidence, R.C. 2921.12(A)
Telacia Fortson	Count 25 – Aggravated Murder, R.C. 2903.01(A) Count 26 – Aggravated Murder, R.C. 2903.01(B) Count 27 – Kidnapping, R.C. 2905.01(A)(3) Count 28 – Kidnapping, R.C. 2905.01(A)(4) Count 29 – Abuse of a Corpse, R.C. 2927.01(B) Count 30 – Tampering with Evidence, R.C. 2921.12(A)
Amelda Hunter	Count 31 – Aggravated Murder, R.C. 2903.01(A) Count 32 – Aggravated Murder, R.C. 2903.01(B) Count 33 – Kidnapping, R.C. 2905.01(A)(3) Count 34 – Kidnapping, R.C. 2905.01(A)(4) Count 35 – Abuse of a Corpse, R.C. 2927.01(B) Count 36 – Tampering with Evidence, R.C. 2921.12(A)
Leshanda Long	Count 37 – Aggravated Murder, R.C. 2903.01(A) Count 41 – Abuse of a Corpse, R.C. 2927.01(B) Count 42 – Tampering with Evidence, R.C. 2921.12(A)
Michelle Mason	Count 43 – Aggravated Murder, R.C. 2903.01(A) Count 44 – Aggravated Murder, R.C. 2903.01(B) Count 45 – Kidnapping, R.C. 2905.01(A)(3) Count 46 – Kidnapping, R.C. 2905.01(A)(4) Count 47 – Abuse of a Corpse, R.C. 2927.01(B)

	Count 48 – Tampering with Evidence, R.C. 2921.12(A)
Kim Smith	Count 49 – Aggravated Murder, R.C. 2903.01(A) Count 50 – Aggravated Murder, R.C. 2903.01(B) Count 51 – Kidnapping, R.C. 2905.01(A)(3) Count 52 – Kidnapping, R.C. 2905.01(A)(4) Count 53 – Abuse of a Corpse, R.C. 2927.01(B) Count 54 – Tampering with Evidence, R.C. 2921.12(A)
Janice Webb	Count 55 – Aggravated Murder, R.C. 2903.01(A) Count 56 – Aggravated Murder, R.C. 2903.01(B) Count 57 – Kidnapping, R.C. 2905.01(A)(3) Count 58 – Kidnapping, R.C. 2905.01(A)(4) Count 59 – Abuse of a Corpse, R.C. 2927.01(B) Count 60 – Tampering with Evidence, R.C. 2921.12(A)
Diane Turner	Count 61 – Aggravated Murder, R.C. 2903.01(A) Count 62 – Aggravated Murder, R.C. 2903.01(B) Count 63 – Kidnapping, R.C. 2905.01(A)(3) Count 64 – Kidnapping, R.C. 2905.01(A)(4) Count 65 – Abuse of a Corpse, R.C. 2927.01(B) Count 66 – Tampering with Evidence, R.C. 2921.12(A)
Latundra Billups	Count 67 – Kidnapping, R.C. 2905.01(A)(4) Count 68 – Kidnapping, R.C. 2905.01(A)(3) Count 69 – Attempted Murder, R.C. 2923.02/2903.02(A) Count 70 – Felonious Assault, R.C. 2903.11(A)(1) Count 71 – Felonious Assault, R.C. 2903.11(A)(2) Count 72 – Rape, R.C. 2907.02(A)(2) Count 73 – Rape, R.C. 2907.02(A)(2)
Shawn Morris	Count 74 – Kidnapping, R.C. 2905.01(A)(3) Count 75 – Kidnapping, R.C. 2905.01(A)(4) Count 76 – Attempted Murder, R.C. 2923.02/2903.02(A) Count 77 – Felonious Assault, R.C. 2903.11(A)(1) Count 78 – Rape, R.C. 2907.02(A)(2) Count 79 – Rape, R.C. 2907.02(A)(2)
Gladys Wade	Count 80 – Kidnapping, R.C. 2905.01(A)(4) Count 81 – Kidnapping, R.C. 2905.01(A)(3) Count 82 – Attempted Murder, R.C. 2923.02/2903.02(A) Count 83 – Felonious Assault, R.C. 2903.11(A)(1) Count 84 – Attempted Rape, R.C. 2907.02(A)(2)

The case proceeded to the mitigation phase on August 1, 2011. The jury found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and unanimously recommended a death sentence. The trial court subsequently

conducted its own independent weighing of the factors and imposed a sentence of death for each of the 11 murder victims on August 12, 2011. Sowell now appeals his convictions and death sentence.

STATEMENT OF THE FACTS

1. Introduction and Summary.

Anthony Edward Sowell is a serial killer who murdered 11 women at his Imperial Avenue home on the east side of Cleveland between 2007 and 2009. Sowell preyed upon women with substance-abuse problems, luring them to his home with the promise of drugs or alcohol. Once inside, Sowell attacked his victims and strangled at least eight of them to death. He buried the bodies of the women in his backyard to avoid detection, and when he ran out of space in his yard, he began storing the decomposing corpses in his house. Sowell later confessed to selecting women who reminded him of his ex-girlfriend in his attempt at exacting vigilante justice against black women with drug problems.

2. 12205 Imperial and Lori Frazier.

Sowell returned home from prison in June 2005 after serving a 15-year sentence for attempted rape. (Tr. Tr. 10403-10404). He moved into the attic area of a house on Imperial Avenue in Cleveland's Buckeye-Shaker neighborhood that was owned by his ailing stepmother, Segerna Sowell. (Tr. 6009). In her late 60s and in poor health, Segerna spent much of the next four years in hospitals, leaving Sowell the lone occupant of the Imperial Avenue home by default. (Tr. 6009-6010).

On July 7, 2005, Sowell met and began a relationship with a woman named Lori Frazier. (Tr. 6181, 6189). She soon moved in with him and began living at the house on

Imperial. (Tr. 6189). The relationship, although tumultuous and occasionally violent, was extremely important to Sowell:

> "Let me tell you a story about her. Crack head. But I loved her and I helped her. I used to go out on the street and look for her because I would be worried. * * * She'd leave and be gone for days and weeks. I said at least call and let me know you're all right. I said why don't you let me get you some help. I said I will be there for you, I will come visit you, I will help you. * * * I think I called suicide prevention * * *. I spent the whole weekend just crying * * *."

(Interview Transcript at 53). Frazier was also addicted to crack cocaine. (Tr. 6190-6191). Sowell, who had been a crack dealer in the late 1980s prior to going to prison, eventually relapsed into his old drug habit after being exposed to it through his relationship with Frazier. (Tr. 10523, 6192-6193).

After the death of Frazier's mother in 2007, she decided to get away from the influence of drugs. (Tr. 6204-6205). Sowell's addiction disgusted Frazier, and she told him that they could not be together if he continued to use. (Tr. 6193-6195). Sowell's attitude towards Frazier began to deteriorate after he started using. (Tr. 6196). He would act "real nasty" and periodically put her out of the house. (Tr. 6199). He sometimes went into a rage and threatened to throw her out of a window. (Tr. 6206). Frazier soon moved out of the house on Imperial Avenue. (Tr. 6205). Sowell was devastated by her leaving and the relationship deteriorated further from there. They eventually stopped seeing each other completely. (Tr. 6233).

After Lori Frazier left Sowell, women began to disappear in the Buckeye-Shaker neighborhood. Over the next two-and-a-half years, 11 women – each one a black female with drug problems who frequented Sowell's neighborhood – went missing. In 2009,

investigators found the bodies of all 11 women buried in and around Sowell's house on Imperial Avenue.

3. The Discovery of the Bodies.

On September 22, 2009, Sowell attacked and raped a woman named Latundra Billups, a mutual friend of both Sowell and Lori Frazier. (Tr. 7114). Billups met Sowell on East 116th Street and walked back to his house with him to drink beer and get high. (Tr. 7121). Sowell led Billups to the abandoned second-floor area of his home. (Tr. 7122). Billups asked Sowell about a rumor she had heard that he had attacked someone, which Sowell denied. (Tr. 7126-7127). He then ordered her to turn around and put his hand forcefully on the back of her neck. (Tr. 7127). When she turned around and asked him what he was doing, he struck her on the side of her head. (Tr. 7127). He told her to take her clothes off and performed forced oral sex on her. (Tr. 7128). He then raped Billups vaginally from behind while choking her with an extension cord until she passed out. (Tr. 7128).

Billups awoke several hours later, after it had grown dark outside, to find Sowell sitting in a chair in the otherwise empty room staring at her. (Tr. 7129). Sowell was shocked to see her awaken and said that he was going to kill both her and himself because he knew he was going to jail. (Tr. 7130). She promised she would not send him to jail, and he apologized, offered to replace a sweater that he had torn off of her, and asked if she would come back the next day. (Tr. 7131-7132).

The next morning, Billups went to University Hospital to report the rape. (Tr. 7133). She gave a statement to police identifying Sowell as the person who attacked her the previous day, and she allowed them to photograph her injuries. (Tr. 7134). After she

left the hospital, she contacted the Cleveland Police Sex Crimes Unit. (Tr. 7137). Detective Richard Durst, after a series of missed communications, finally took a statement from Billups at the Sex Crimes Unit office on October 27, 2009. (Tr. 7138). On October 28, Durst met with a Cleveland City Prosecutor, who issued an arrest warrant for Anthony Sowell pertaining to the rape of Latundra Billups. (Tr. 7183). Durst also conferred with an Assistant Cuyahoga County Prosecutor and obtained a search warrant for the house on Imperial Avenue. (Tr. 7184).

Durst and members of the SWAT team executed the search warrant at approximately 6:50 p.m. on October 29. (Tr. 5977). Sowell was not present in the home at the time. After sweeping the house room by room, SWAT team members eventually came to a locked door at the south end of the hallway of the third floor attic area. (Tr. 5982-5983). SWAT kicked in the door and Officer Richard Butler, the first man into the room, discovered two decomposing bodies lying facedown on the floor. (Tr. 5983). Sowell had covered the bodies with piles of clothing and wrapped one in a black plastic garbage bag up to her knees. (Tr. 8333-8334). He had covered the windows to the room with garbage bags. (Tr. 5984-5985). There was also a shovel lying on the floor between the two bodies. (Tr. 5986). After SWAT reported to Durst what they had found, Durst then notified the Homicide Unit. (Tr. 5988). Cleveland police then began a two-day manhunt for Sowell.

Over the next five days, investigators would remove a total of 11 bodies in the house on Imperial Avenue:

- Two (Telacia Fortson and Diane Turner) were lying on the floor of the front room on the third floor.
- One (Janice Webb) was buried in a mound of dirt under the basement stairs.

- One (Nancy Cobbs) was stuffed into a garbage bag that was lying on the floor of the front room next to the bodies of Fortson and Turner.
- One (Tishana Culver) was buried in a mound of dirt in a crawlspace cut out of a wall in the front room of the third floor.
- One (Leshanda Long) was only partially located as a skull in a bucket in the basement. The rest of the body was never found.
- Five (Tonia Carmichael, Crystal Dozier, Amelda Hunter, Michelle Mason, and Kim Smith) were buried in shallow graves in the backyard.

4. Sowell's Arrest.

Sowell had been at his sister's house on East 130th Street playing video games with his nephew when the SWAT team executed the search warrant. (Tr. 7670). Sowell's neighbor Debbie Madison, who lived across the street from Sowell's house on Imperial Avenue, came to the door and told Sowell that the police had found two dead bodies inside his house. (Tr. 7544-7546). Sowell became excited and walked down the driveway to Madison's car, saying, "It's all going to come out now." (Tr. 7546). As Madison drove Sowell back to his house on Imperial, she asked him about the bodies. (Tr. 7548). He replied, "That girl made me do it." (Tr. 7548). When they arrived at the corner of 123rd and Imperial, Sowell saw the police activity at his house and told Madison to take him back to his sister's home. (Tr. 7549). After Madison dropped Sowell off, she went to the police and led them back to the home on 130th. (Tr. 7552). Sowell was gone by the time they arrived. (Tr. 7553).

At 11:45 a.m. on the morning of October 31, 2009, two days after SWAT initially entered the house on Imperial and discovered the first two bodies, Fourth District Cleveland police officers Charles Locke and Iris Jones received a tip that a person matching Sowell's description was walking down the street nearby. (Tr. 7692). The officers followed

the informant to the corner of East 97th Street and Dickens, where they found Sowell, wearing a backpack, and arrested him. (Tr. 7693). Sowell identified himself as "Anthony Williams" and told the officers that the police had arrested and cleared him the previous night. (Tr. 7693-7694).

At that point, Cleveland Police Sgt. Ronald Ross and three other detectives arrived at the scene. (Tr. 7700). Officers Locke and Jones had been unable to confirm that Sowell was the person who they had been searching for, so Ross produced a photograph of Sowell from his vehicle that his command post had distributed to officers in the Fourth District. (Tr. 7702). Believing that the photo bore a close but inconclusive resemblance to Sowell, Ross decided to take Sowell back to Fourth District headquarters for fingerprint identification. (Tr. 7702). When they arrived at headquarters, Ross showed Sowell the machine that they would use to identify him. (Tr. 7704). Upon hearing this explanation, Sowell dropped to his knees, confessed that he was the person the police had been looking for, and said that he wanted to die. (Tr. 7704-7705).

The officers read Sowell his *Miranda* rights twice – once at the Fourth District and once in the police car as the officers drove him to the City of Cleveland jail. (Tr. 7706, 7708). Sowell indicated that he understood both times. (Tr. 7706, 7709). While in the back of the police car, Sowell spoke freely with the officers, insisting that he was not a bad guy. (Tr. 7709). He claimed that the officers had already found all the bodies that there were on the property. (Tr. 7709). When Ross asked him about the backyard, Sowell replied, "Oh, those too, all those." (Tr. 7709). Investigators had found only one body in the backyard at that point. (Tr. 7709). Ross and the other officers brought Sowell to the

Homicide Unit office on the sixth floor of the Justice Center downtown to interview him. (Tr. 7709-7710).

5. The 11 Murder Victims.

Each of the 11 murder victims, and the circumstances surrounding their deaths, are described to the extent possible below in the order in which they went missing. At least 8 of the 11 women died of ligature strangulation, and almost all were nude.

a. Crystal Dozier (Victim #1)

Crystal Dozier was a 35-year old former telemarketer who cleaned homes and did shopping for her elderly neighbors. (Tr. 6300, 6302). She was first married at age 16 to a husband who abused her and introduced her to drugs. (Tr. 6300). Crystal struggled with substance abuse problems her entire life and would occasionally relapse for a day or two at a time when she would leave home. (Tr. 6301). She had seven children, two of whom – Anthony and Antonia - lived in the area and maintained steady contact with her. (Tr. 6296-6299). Crystal was living with her fiancé Louis on Audubon Road in the Buckeye-Shaker neighborhood of Cleveland at the time she went missing in May of 2007. (Tr. 6297-6298).

Crystal would call her mother Florence every day and ask, "Has anybody told you today that I love you?" (Tr. 6303). Florence last spoke to Crystal on May 17, 2007. (Tr. 6305). Both Anthony and Antonia filed separate missing person reports and the family put up flyers with her picture all over the neighborhood of East 116th Street. (Tr. 6306-6307). But when they returned to that area the next day, someone had removed each flyer from where the family had posted them the day before. (Tr. 6308-6309).

Investigators uncovered Crystal Dozier's body, nude from the waist down and badly decomposed, buried in the backyard of Sowell's house. The coroner ruled the cause of

death to be asphyxiation by ligature strangulation. (Tr. 8147). Her wrists were bound above her head and her ankles were tied together with a wire cable. (Tr. 8148-8149). The cloth ligature Sowell used to strangle her remained tied and knotted around her neck. (Tr. 8150). Sowell had buried the body after wrapping it in two layers of translucent plastic and tying it together with black coaxial-style cable and grey duct tape. (Tr. 8343-8348). These were the most sophisticated wrappings of any victim based on the number of different materials Sowell had used and the time and effort it would have taken Sowell to conceal and bury the body. (Tr. 8344). The coroner estimated Dozier's date of death to be on or about June 10, 2007. (Tr. 8184).

b. Tishana Culver (Victim #2)

Tishana Culver, 31-years old at the time she went missing, worked off-and-on at fast food restaurants and as a nursing assistant in Parma. (Tr. 6448). When she was 18 years old, her fiancé was murdered, after which she checked herself into a psychiatric facility. (Tr. 6469-6470). The doctors there diagnosed her as suffering from bipolar disorder and depression. (Tr. 6470). She went on to have five children, all of whom were in the custody of her female relatives at the time of her death. (Tr. 6471). Around 2002, she met a man named Carl Johnson, with whom she had a violent long-term relationship. (Tr. 6472). She and Carl would smoke marijuana and crack cocaine while they were together. (Tr. 6450).

In October 2007, Tishana moved in with her sister Latonya Irby, who lived five houses down from Sowell's house on Imperial Avenue. (Tr. 6473, 6454). Tishana had no car, so Latonya would take her job-hunting to fill out applications. (Tr. 6474). In March of 2008, Latonya confronted Tishana after learning that Tishana was still seeing her old boyfriend Carl, who Latonya disapproved of because of his abusive nature and his access to

drugs. (Tr. 6476). Latonya angrily told Tishana that she was tired of being stuck in the middle of her problems and that Tishana should go live with Carl and not call her anymore. (Tr. 6476). Tishana left the house after this argument and never returned. (Tr. 6477). Latonya assumed that Tishana was going to Akron to stay with Carl. (Tr. 6477). She found out later that her sister had never arrived in Akron, and that her body was among those inside the house on Imperial Avenue. (Tr. 6481-6482).

Sowell had stuffed Tishana Culver's body, face down, into a crawlspace in the west wall of the front room the house. (Tr. 8228). Sowell wrapped the body in multiple black plastic garbage bags and tied it together with gray duct tape. (Tr. 7979). He then covered the body with dirt that he carried up to the attic from his backyard. (Tr. 7979). Sowell had bound her ankles with knotted rope and her wrists with a combination of rope and a brown sock. (Tr. 7990, 8232). Culver was the only victim who was fully clothed. (Tr. 9259). The cause of death was asphyxiation by strangulation. (Tr. 7982). There was also some evidence that Sowell had strangled Culver manually during a struggle, as he had fractured the hyoid bone in her neck. (Tr. 7982). The coroner estimated that Culver died on or about June 15, 2008. (Tr. 8038).

c. Leshanda Long (Victim #3)

At 24 years old, Leshanda Long was the youngest of Sowell's victims. (Tr. 6496). Her father Jim Allen had raised her and her four brothers in a home on the east side of Cleveland. (Tr. 6495-6496). She had three children, the first of which came when she was 15. (Tr. 6497). She lived near 123rd Street and Imperial with her boyfriend. (Tr. 6498). Her father knew that she had been in trouble in the past for her drug use. (Tr. 6499). Although Leshanda would lose contact with her family for long periods of time, she would

always be sure to call her father and her aunt every year on their birthdays. (Tr. 6507-6508). On her aunt's birthday in August of 2008, there was no phone call. (Tr. 6508).

Investigators found Long's skull inside a red plastic bucket on the floor of his basement. (Tr. 8161). The bucket had been chewed by an animal. (Tr. 8163). The coroner could not determine the cause of death beyond a general classification as homicidal violence. (Tr. 8165). There was no decomposition tissue in the bucket, so the coroner could not determine at what point Sowell had hidden the skull there. (Tr. 8166). The rest of Long's body was never found. The coroner estimated that Long had died on or about August 9, 2008. (Tr. 8197).

Around September of 2008, Sowell attacked and raped a woman named Vanessa Gay in his home. (Tr. 6521, 6545). Sowell led Gay up to his bedroom on the third floor. (Tr. 6527). As she passed by the west room, she noticed that the doorway had been covered with a sheet of plastic that was hanging down from where Sowell had stapled it to the top of the door frame. (Tr. 6529). Once inside the bedroom, Sowell punched her in the face and told her to take her clothes off. (Tr. 6532-6533). He then raped her repeatedly and held her captive overnight. (Tr. 6534-6536). At one point, Sowell released Gay long enough for her to use the bathroom. (Tr. 6537). As she walked down the hallway of the third floor attic area, she saw on her left that Sowell had pulled up the plastic in the doorway of the third room:

Q. And as you walked to the bathroom, did you notice anything about the room on the left?

A. The plastic was pulled up and I saw something on the floor. And it looked like it was a body, it had no head on it.

Q. I need to you describe in detail, Miss Gay, what you saw there.

A. The plastic was pulled up, and out of the corner of my eye, as I'm walking, I look and it was propped up, sitting on the floor, and it was taped up, it had no head on it.

(Tr. 6537-6538). Gay also confirmed that she knew Leshanda Long as "Thick," that she had not seen Long since the summer of 2008, and that she never saw Long again after Sowell released her. (Tr. 6544-6545).

d. Michelle Mason (Victim #4)

Michelle Mason was the youngest of seven children. (Tr. 6530). She dropped out of high school after the ninth grade and left home at 15 or 16 years old to attend Job Corp in New York. (Tr. 6531). There she lost touch with her family and became involved in drugs. (Tr. 6352). She had two sons, Franklin and Shannon. (Tr. 489-490). Eventually she contracted HIV. (Tr. 6354). When she returned home to Cleveland, her family knew that she was addicted to drugs by her attitude and her tendency to stay out late or disappear for a day or two at a time. (Tr. 6357). In 2000, Michelle was the victim of a shooting in which the bullet entered through her right eye and became permanently lodged in her spine. (Tr. 6358). She wore a prosthetic eye as a result of this incident. (Tr. 6359). After she recovered, she attended substance-abuse counseling at Marymount Rehab Center. (Tr. 6364). When she went missing in October of 2008, she was 44 years old. (Tr. 6364).

The Mason family posted missing persons flyers with Michelle's photograph all over the neighborhood around Imperial Avenue. (Tr. 6367). But just as with the flyers that Crystal Dozier's family had posted, someone would always take them down within a day or so. (Tr. 6371-6372). Assad Tayah, who owned the liquor store on the corner of Imperial and 123rd Street, later told Michelle's mother Adlean Atterberry that Sowell came in to his

store to purchase large black plastic garbage bags. (Tr. 6120, 6388). While Sowell was there, he took down the Mason family's flyers. (Tr. 6388).

Investigators removed Michelle Mason's body from a shallow grave in the backyard. (Tr. 8002). Sowell had rolled the body up inside a black comforter and an orange blanket, and then wrapped two plastic bags around the blankets and tied them together with gray duct tape. (Tr. 7996-7997). She was nude from the waist down and lying in a prone position. (Tr. 7997). Sowell had also left a used condom inside the wrappings with the body. (Tr. 8375). A brown sock remained tied around her neck as a ligature, and the coroner again found the cause of death to be asphyxia by ligature strangulation. (Tr. 8363, 8003). The coroner estimated that Mason had died on or about October 18, 2008. (Tr. 8045). The Trace Evidence Department found carpet samples consistent with the carpeting of the front room of Sowell's house on the body, indicating that Sowell had left Mason's body lying on the floor of that room prior to burying her outside. (Tr. 8366-8367).

e. Tonia Carmichael (Victim #5)

Tonia Carmichael worked as a medical secretary at Mt. Sinai Hospital (Tr. 6584). Carmichael had succumbed to drug abuse at age 42 after the birth of her third child. (Tr. 6585). She frequented the Buckeye-Shaker area around 116th Street and would disappear there for days at a time. (Tr. 6587). At 4:30 on the afternoon of November 10, 2008, Carmichael stopped at her mother Barbara's house to pick up some anti-freeze for her truck. (Tr. 6590). Barbara told her to go straight home, but when she called at 6:30, her daughter did not answer. (Tr. 6590). Carmichael's family found her abandoned truck parked on 118th Street and Kinsman. (Tr. 6591). She was 52 years old, and the oldest of Sowell's victims. (Tr. 6583).

Tonia Carmichael's body was the first to be unearthed from a shallow grave in Sowell's backyard. (Tr. 8126). Sowell had wrapped the body, totally nude, in two black plastic bags and a white mattress cover (Tr. 8224-8225). A black electrical cord from a cell phone or camera charger remained wrapped around her neck as a ligature. (Tr. 8125). Sowell had tied the cord so tightly that when the coroner removed it, it left a visible mark on the decomposing skin of Carmichael's neck. (Tr. 8032). Sowell had also bound her wrists together with two white socks and a piece of string. (Tr. 8227). The cause of death was asphyxia by ligature strangulation. (Tr. 8134). The coroner estimated Carmichael's date of death to be on or about November 11, 2008. (Tr. 8178).

f. Kim Smith (Victim #6)

Kim Smith, who went by the nickname of "Candy," was 43 years old at the time she went missing. (Tr. 6902). She had developed a substance-abuse problem in high school and became addicted to crack cocaine. (Tr. 6904). Later in life she moved in with her father Donald and became active in her church choir. (Tr. 6905, 6907). On January 17, 2009, three days before her 44th birthday, she went shopping with her aunt Christine. (Tr. 6907-6908). They returned home and Smith then went back out alone to walk to her boyfriend's house. (Tr. 6908). Her family never heard from her again. (Tr. 6909).

Investigators discovered Smith's body in a shallow grave in the backyard covered in three black plastic garbage bag that Sowell had wrapped in a seven-foot sheet of translucent plastic material. (Tr. 8236, 8240). The fabric that Sowell had used to bind her wrists and ankles was still visible on her body. (Tr. 8238). Because of the advanced decomposition of the body, the coroner could only conclude that the cause of death was homicidal violence, type(s) undetermined. (Tr. 7991). The coroner estimated that Kim had

died on or about January 1, 2009. (Tr. 8039). Smith's blood was present on carpeting collected from the second-floor porch of Sowell's home. (Tr. 8735-8736).

g. Amelda Hunter (Victim #7)

Amelda Hunter was a 46-year old mother of three. (Tr. 7049, 7053) She was also a cousin of Crystal Dozier, Sowell's first victim. (Tr. 6312). She began smoking marijuana at 17 and then crack in her 20s. (Tr. 7054). Her addiction caused her to leave home and go missing for days at a time while she walked the streets around the Buckeye-Shaker neighborhood. (Tr. 7059-7060). She worked odd jobs as a bartender and at department stores. (Tr. 7077). She kept in close contact with her family and spoke to her sister Denise on the phone almost every day. (Tr. 7055). At one point in 2007, Hunter lived two houses down from Sowell on Imperial Avenue. (Tr. 7057). Her sister Denise once accompanied her to Sowell's house where she saw Hunter greet Sowell before going upstairs to the second floor. (Tr. 7057-7059). After April 19, 2009, her sister suddenly stopped hearing from her. (Tr. 7056).

Sowell had buried Hunter's body in the rear of his backyard. (Tr. 8140). She was nude from the waist down and wrapped in multiple black plastic garbage bags. (Tr. 8139). The cause of death was again asphyxiation by ligature strangulation. (Tr. 8145). Sowell had strangled Hunter to death with the shoulder strap of a bag or briefcase and the strap remained tightly bound around Hunter's neck. (Tr. 8358). Trace Evidence found carpet fibers from the front room of the third floor – where the bodies of Telacia Fortson and Diane Turner were lying – on Hunter's body when she was exhumed from the ground. (Tr. 8356). The coroner estimated that Hunter died on or about April 18, 2009. (Tr. 8193).

h. Telacia Fortson (Victim #8)

Telacia Fortson was a 31-year old mother of three. (Tr. 6983). She had developed a drug habit in her 20s. (Tr. 6984). She alternated between living with her adoptive mother Inez Fortson in East Cleveland and her longtime boyfriend Terrance Minor in the Buckeye-Shaker neighborhood between Forest and Parkview Avenues. (Tr. 6985). They had two daughters, of whom Terrance had custody. (Tr. 7094-7095). Fortson would stop by the house three times a week to see her daughters and to brush their hair. (Tr. 7098). Terrance noticed that this pattern was broken around late May or early June of 2009, when Fortson suddenly stopped coming by the house. (Tr. 7100). Her mother reported last seeing her on June 3, 2009. (Tr. 6986).

Telacia Fortson's body was the first that the SWAT team encountered when they entered Sowell's home on October 29, 2009. (Tr. 5983-5984). She was lying facedown on the floor of the front room, nude below the waist and covered by a pile of clothing. (Tr. 5983, 7952). The ligature tied around Fortson's neck was a multicolored T-shirt. (Tr. 8388). Sowell had taken many of Fortson's belongings and left them around his house, including her earrings, food stamp card, and her corduroy skirt. (Tr. 7764, 8393-8394, 8724). A receipt found in a garbage bag on the second-floor balcony of Sowell's home showed that Sowell had used Fortson's food-stamp card on September 17, 2009, months after she went missing. (Tr. 1859-1860). The coroner likewise found that Fortson died as a result of asphyxiation by ligature strangulation. (Tr. 7957). The coroner estimated her date of death as on or about May 31, 2009. (Tr. 8013).

i. Nancy Cobbs (Victim #9)

Nancy Cobbs, 43, worked odd jobs at stores and restaurants. (Tr. 6799). Her daughter Kyana Hunt knew from an early age that Cobb was on drugs and that she had been to prison in the past because of her drug abuse. (Tr. 6799). Cobbs lived on the West Side of Cleveland with her boyfriend Simmie McFarland, but she regularly visited her daughters on the East Side and was known to frequent the Buckeye-Shaker neighborhood. (Tr. 6800-6801). On April 20, 2009, Cobbs' family saw her at her mother's house for her birthday. (Tr. 6803).

Cobbs' daughter Audrey Williams last saw her a few days later on April 24 at around 5:00 in the afternoon. (Tr. 6820). Cobbs told Williams that she was going to meet with her friend Tanja Doss. (Tr. 6822). Cobbs spoke to her daughter Audrey several times over the phone after this and told her that she was staying with someone other than Doss. (Tr. 6824). Williams knew something was wrong based on the way her mother was speaking. (Tr. 6824). She never heard from her mother again after that. (Tr. 6825). Her family put up missing person's flyers around the Buckeye-Shaker neighborhood, but just as with the flyers that the Dozier and Mason families had posted, someone quickly removed them. (Tr. 6818-6819).

Sowell had crammed Cobbs' body into two black plastic bags, putting one bag over the top half of her body and the second over the bottom half from the opposite end. (Tr. 8218). The bags were lying on the floor next to the body of Telacia Fortson and the crawlspace where Sowell had hidden the body of Tishana Culver. (Tr. 8075). Cobbs' body had decomposed at an accelerated rate and had been reduced to a skeleton and soft tissue that weighed only 46 pounds on arrival at the Coroner's office. (Tr. 7974-7976). Upon

opening the bags, investigators discovered shoelaces tied around Cobbs' wrists and as a ligature around her neck. (Tr. 8222-8223). The coroner ruled her death a result of asphyxiation by ligature strangulation. (Tr. 7975).

j. Janice Webb (Victim #10)

Janice Webb was 48 years old at the time she disappeared. (Tr. 8153). Her son Lamar Webb knew that his mother had a drug problem because of the constant traffic in and out of their house when he was a child and because he had personally seen her smoke crack. (Tr. 6922). He last saw her in June of 2009. (Tr. 6941). Webb lived on the West Side of town in Lakewood, but she frequented the Buckeye-Shaker neighborhood around Buckeye Road. (Tr. 6924). At one point, she lived on 126th Street and Buckeye, approximately four blocks from Sowell's house on Imperial Avenue. (Tr. 6938). After she went missing, the Webb family put up flyers in the neighborhood of 125th and Kinsman that again disappeared shortly afterward. (Tr. 6942-6944).

Sowell had buried Webb's body under the stairs in a mound of dirt that he had carried down into the basement from his backyard. (Tr. 8214-8215). He had wrapped the body loosely in a large sheet of translucent plastic that was not secured by any bindings. (Tr. 8216). He had then laid several pieces of plywood over the mound of dirt. (Tr. 8457). Webb's body had the most striking evidence of ligature strangulation and of a prolonged kidnapping. The shirt that Sowell had used to gag her was still tied in her mouth and knotted around the back of her head. (Tr. 8154). Sowell had strangled Webb with a green belt that remained tightly coiled around her neck. (Tr. 8154). He had also bound her wrists with shoelaces. (Tr. 8154). The cause of death was again asphyxia by ligature

strangulation. (Tr. 8159). The Coroner originally estimated that Webb had died on or about June 3, 2009. (Tr. 8187).

k. Diane Turner (Victim #11)

Sowell's final victim, Diane Turner, was 38 years old at the time of her death. (Tr. 7963). Turner had a 10-year old daughter living in the custody of a foster parent, Jasneth Groves, in Florida and Jamaica. (Tr. 7004-7005). Turner's fiancé knew that she fallen into crack cocaine abuse after she suffered a miscarriage in 2002. (Tr. 7026). Groves returned to Cleveland early in 2009 and got Turner a job washing dishes at a Jamaican restaurant on 116th Street called "Daily's." (Tr. 7005, 7008). She would see Turner every day around this time period and knew that she was living somewhere in the Buckeye-Shaker neighborhood on Parkview Avenue. (Tr. 7006). Groves last saw Turner around the beginning of September 2009. (Tr. 7010).

Diane Turner was the second of the two bodies that the SWAT team encountered as they kicked down the door to the front room of the third floor. (Tr. 7962-7963). Turner was lying next to the body of Telacia Fortson, facedown and covered in a pile of clothing. (Tr. 7962-7963). At some point Sowell had wrapped her legs in a garbage bag, but then stopped, dropping the body with the legs bagged up to her knees on the floor where she lay until SWAT entered the room. (Tr. 7964). She was nude from the waist down. (Tr. 7964). Turner had no ligature or bindings, and her body was too badly decomposed to determine a cause of death beyond homicidal violence, type(s) undetermined. (Tr. 8030-8031). Investigators found Turner's blood on the grey sheet from Sowell's bed. (Tr. 8733-8734). The coroner estimated that Turner had died on or about July 15, 2009. (Tr. 8030).

6. The Five Surviving Victims

In addition to Latundra Billups, four other women testified that they had been attacked by Sowell:

a. Vanessa Gay

Sowell attacked Gay shortly after Leshanda Long disappeared in August or September of 2008. (Tr. 6521). Gay met Sowell on the street one night in September. (Tr. 6522). Sowell told her that it was his birthday and that no one was celebrating with him. (Tr. 6523). Gay felt sorry for Sowell and accompanied him to his house to do some marijuana and crack. (Tr. 6523). Sowell led Gay into his bedroom where he suddenly turned on her, punched her in the face, and then raped her repeatedly. (Tr. 6530-6536). He threatened to lock her in the closet for three days and told her that no one could hear her scream. (Tr. 6535-6537). Sowell told Gay as he was raping her that he was doing this because of his hatred for women who, like his ex-girlfriend Lori Frazier, smoked crack. (Tr. 6533-6534). Although Sowell continued to threaten and taunt Gay, he soon became unsure as to whether Gay deserved the punishment that he normally inflicted on women who reminded him of Frazier:

> Q. "Then what happened, Miss Gay?
>
> A. "And then he raped me. I mean, he got on top of me and raped me, and kept telling me -- he would come back out of it and say, he told me: You aren't like the others. But then he kept telling me: You don't deserve what I'm going to do to you. He kept talking about all the women who did him wrong, who smoked crack, and he was just talking and I would agree with him. Or I would try and not to say nothing that upset him. And then he told me -- he told me that he had an insatiable sexual appetite * * *."

(Tr. 6535).

Sowell periodically left the bedroom to use the bathroom or to call his sister and talk about when she and the kids would visit next. (Tr. 6539). During one instance in which Gay walked down the hall to use the bathroom, she discovered the headless body in the west room of the third floor. (Tr. 6537). Sowell eventually released Gay, telling her that she could come back on Monday after he got paid. (Tr. 6540). Gay called the police to report the rape, but did not go into the station to make a statement. (Tr. 6541-6542).

b. Gladys Wade

On the night of December 8, 2008, Gladys Wade was walking westbound on 123rd Street when she met Sowell. (Tr. 6627). He wished her a Merry Christmas and asked if she wanted to drink some beer with him. (Tr. 6628). When she declined, he grabbed her, put her in a choke hold, and dragged her up his driveway into his house. (Tr. 6629-6630). She awoke lying on the floor of the front room of the attic, the same room where SWAT would discover the bodies of Telacia Fortson and Diane Turner almost a year later. (Tr. 6634).

Wade called for help and Sowell came into the room, punched her in the face, and told her to take her clothes off. (Tr. 6634). She began to fight back, scratching at his face and grabbing his testicles. (Tr. 6636). She got past Sowell and ran down the third floor hallway, but he grabbed her when she got to the top of the stairway and they fell down the stairs together. (Tr. 6636). He got on top of her and began strangling her, saying, "Bitch, stop screaming, you're going to die." (Tr. 6637). She fought him off again and ran out of the house. (Tr. 6638-6639). Sowell chased her into the restaurant across the street and told the occupants that she had stolen from him. (Tr. 6642). Wade waited until Sowell had left and then flagged down a passing police car. (Tr. 6643).

Based on Wade's statement, her visible injuries, and corroborating evidence of a struggle both inside and outside Sowell's house, the officers arrested him. (Tr. 6715-6727). The arresting officer, however, incorrectly labeled the incident report as "Rape." (Tr. 6737). Because Wade had been clear that she had fought Sowell off before he had a chance to rape her, the Assistant City Prosecutor determined that there was insufficient evidence to file charges against Sowell for rape and released him with 48 hours. (Tr. 6652-6653. 6683-6684, 6737-6738).

c. Tanja Doss

On April 21, 2009, Tanja Doss went over to Sowell's house to watch the Cavaliers game and to get high. (Tr. 6849). Sowell talked about how he missed his girlfriend. (Tr. 6852). He suddenly grabbed Doss by the throat and said, "Bitch, you can be the next crack head bitch dead up in the street with nobody give a f*** about you." (Tr. 6852-6853). He told her to knock three times on the floor if she wanted to live. (Tr. 6853). He ordered her to take her clothes off and lie down on the bed next to him. (Tr. 6854). She curled up into a fetal position and went to sleep. (Tr. 6854). The next morning, Sowell acted like nothing had happened and allowed her to leave. (Tr. 6855-6857). After she left, she called her friend Nancy Cobbs and told her that Sowell had attacked and choked her. (Tr. 6858). Cobbs disappeared two days later. (Tr. 6804). Doss did not go to the police until after the discovery of the bodies. (Tr. 6861).

d. Shawn Morris

In the early morning hours of October 20, 2009, Shawn Morris was waiting for a bus at 140th Street and Kinsman Road. (Tr. 7211). She saw Sowell get off a bus across the street and walk to a nearby house to buy some crack. (Tr. 7211-7213). Sowell eventually

walked over to where Morris was and began talking and drinking with her. (Tr. 7215). Around 7:00 a.m., Morris decided to leave the bus stop area so that her kids would not see her there drunk as they went to school. (Tr. 7219). Sowell asked her if she wanted to come back to his house to sober up, and the two of them walked back to Imperial Avenue. (Tr. 7219-7220).

Sowell led Morris up to his bedroom. (Tr. 7222). They began drinking beer and smoking crack. (Tr. 7226-7227). Around 12:00 noon, she told Sowell that she had to leave, and he walked her down the stairs. (Tr. 7227-7228). She soon realized that she had left her I.D. in Sowell's house, however, and walked back to Sowell's house to get it. (Tr. 7229-7230). Once she was inside the door, Sowell immediately put her into a military chokehold and said he was going to kill her. (Tr. 7230-7231). He dragged her up the steps and back to his bedroom, where he raped her vaginally and anally. (Tr. 7232-7233). While he was doing so, he began ranting about his hatred for women who walked the streets:

> Q. Okay. And while he's raping you, is he saying anything to you?
>
> A. Yeah, he was talking about how he hated -- I hate you bitches. Look at you, you've got a husband at home and you out here in the streets, and he was just going on and on about how I hate bitches, that's why I hate bitches.

(Tr. 7232).

Morris escaped by waiting until Sowell had left the room and then jumping naked out of a third floor window onto the cement sidewalk below. (Tr. 7234-7236). While Morris was lying unconscious on the pavement, Sowell attempted to ward off several witnesses who had seen Morris fall from the window by saying that she was his wife and that she had accidentally fallen from the window while they were having sex. (Tr. 7323, 7360-7365, 7404). Sowell attempted to pick Morris up and move her back inside the

house, but stopped when one of the onlookers yelled at him not to do so. (Tr. 7361). Sowell became visibly angry and tried to get the witnesses away from where Morris had fallen. (Tr. 7365). He eventually got Morris to her feet and back inside. (Tr. 7322). An ambulance soon came to the house to pick Morris up after one of the witnesses called 9-1-1. (Tr. 7325, 7363). Sowell told the EMS technicians that he was Morris' husband and rode in the ambulance with her to the hospital. (Tr. 7284). She woke up two days later with an aneurysm, a cracked skull, eight broken ribs, and two broken hands. (Tr. 7236). She did not go to the police because Sowell had threatened to kill her if she did. (Tr. 7237). The attack on Shawn Morris came only nine days before SWAT executed the search warrant on October 29.

7. Sowell's Police Interviews.

Sowell gave two interviews to members of the Cleveland Police Department, one on October 31 – the day he was arrested – and a second two days later on November 2. The combined interviews lasted roughly 11 1/2 hours and were conducted in the Homicide Unit office on the sixth floor of the Justice Center.

Sowell first spoke to three members of the Sex Crimes Unit, Lieutenant Michael Baumiller and Detectives Richard Durst and Joseph Rini, regarding the original rape accusation of Latundra Billups that had resulted in the arrest warrant. (Tr. 8794). Baumiller read Sowell his *Miranda* rights for a third time. (Tr. 8795, Interview Transcript at 3-4). Sowell then voluntarily spoke to the Sex Crimes Detectives for roughly 1 1/2 hours. (Tr. 8796). At that point, Cleveland Homicide Detectives Melvin Smith and Lem Griffin entered and assumed control of the remainder of the October 31 interview and the November 2 interview. (Tr. 8827).

During his interviews, Sowell denied raping Latundra Billups and claimed that her accusation was a result of her failed attempt to hustle him for drug money. (Interview Transcript at 20-21, 772). When the discussion turned to the bodies in his house, Sowell became emotional and admitted that he had violently punished women in his neighborhood because "I just hate what they did – what they do to me." (Interview Transcript at 50). He admitted that he was resentful of the women because they "don't give a f*** about nothing, nobody. Even when you help them." (Interview Transcript at 53). Sowell explained that he divided the women in his neighborhood into "good ones" and "bad ones":

DETECTIVE GRIFFIN:	And I noticed you said bad ones and good ones. You divided them up. You said good ones and bad ones. And that goes back to the bad ones. And the bad ones are ones that remind you of your girlfriend?
MR. SOWELL:	Yes.
DETECTIVE GRIFFIN:	And the ones that's doing the drugs and got kids and families at home, that's what the bad ones are?
MR. SOWELL:	I think so. Mostly, yeah.
DETECTIVE GRIFFIN:	And the good ones, what are they -- what's – what's the criteria for being a good one? What are the good ones?
MR. SOWELL:	I don't know.
DETECTIVE GRIFFIN:	Are any of the good ones people that get high and have kids at home but they're not in the streets? They're just --
MR. SOWELL:	Yeah, they can.
DETECTIVE GRIFFIN:	But to be bad --

MR. SOWELL: Going to school.

DETECTIVE GRIFFIN: Going to school, they're doing something for themselves?

MR. SOWELL: Work. Yeah.

DETECTIVE GRIFFIN: But if they're out here in the street just doing drugs and got kids at home and soliciting, trying to scam or whatever, those are the bad ones? Is that – am I correct in saying that?

MR. SOWELL: Yeah.

DETECTIVE SMITH: So out of the girls that are in that house, are some of them good and some of them bad, or all of them considered bad?

MR. SOWELL: Bad.

DETECTIVE SMITH: They're all bad.

MR. SOWELL: Bad.

(Interview Transcript at 285-287).

Sowell said he would only direct his anger towards these "bad" women. (Interview Transcript at 65). He specifically resented that they would neglect their children while they walked the streets to feed their drug habit:

MR. SOWELL: All the good people out there. (Inaudible) they hurt, they use. All the kids [they] don't give a f*** about – what about your kids. Why aren't you with your kids. You would rather be doing this [drugs] than – this mean more than your kids? You are all mothers, women. Fathers, yeah, but you are all women. * * *

* * *

DET. BAUMILLER: Tone, these women, they were hurting their children in their families by the lifestyle they were leading.

MR. SOWELL: Using people, tricking them, just robbing them, lying. They will trick you (inaudible). So many of those things. Still (inaudible) take your watch taken from you, snatch and gone.

(Interview Transcript at 85-86). When the detectives asked Sowell what particular type of woman brought out his anger, he replied, "They reminded me of my girl. That's the best I can tell you." (Interview Transcript at 285-286, 622, 795-796). He referred to the breakup with his girlfriend Lori Frazier as the turning point for when he began to take his anger out on the women in his neighborhood, saying, "That's when I started gearing things up." (Interview Transcript at 56).[2]

Sowell claimed that all of the victims had come to his house voluntarily. (Interview Transcript at 156). Each of the victims had tried to "con" or hustle him in some way for money or for drugs. (Interview Transcript at 787). He repeatedly insisted that he was unable to remember any names or faces of his victims, and that he had had killed them all in a dream-like state in which he heard a voice tell him to "punish them." (Interview Transcript at 84). He remembered choking the victims with his hands in the dreams, and that he would wake up the next morning to find they had disappeared from his house. (Interview Transcript at 187, 452-453, 680).

Smith and Griffin were able to cast serious doubt on Sowell's inability to remember when they showed him pictures of several of the victims. (Tr. 8862). Sowell claimed that he did not recognize any of them. (Tr. 8862-8864). The detectives then showed him a picture of his longtime girlfriend Lori Frazier. (Interview Transcript at 900-901). Sowell

---

[2] The court reporter's transcription of Sowell's police interview incorrectly transcribes this statement as, "That's when I started hearing things." (Interview Transcript at 56). Listening to the recording makes it clear, however, that Sowell actually says "That's when I started gearing things up."

again claimed he could not recognize her. (Interview Transcript at 901). Moreover, Detectives Smith and Griffin also told Sowell during the interview that they had only found six bodies up to that point. (Interview Transcript at 193). Sowell had previously denied that there were any more bodies yet to be found. (Tr. 7709). He was most likely either genuinely confused as to which bodies the police had found, or was simply trying to avoid saying anything that would alert the officers that there were more bodies in the backyard.

8. The Mitigation Phase.

On August 1, 2011, the case proceeded to the mitigation phase. Sowell called 24 witnesses. He also gave an unsworn statement on his own behalf in which he refused to discuss the case and stated, "This is not typical of me." (Tr. 11497). Sowell pursued and presented a comprehensive range of mitigating evidence intended to highlight a number of different mitigating factors. The trial court noted that Sowell had presented mitigating evidence related to "the love and support of defendant's family; his academic record; his work history; his ability to function as a productive person in a structured environment such as prison; and his remorse for his crimes." (Tr. 11622). The court carefully weighed each factor prior to sentencing. (Tr. 11622-11631).

Sowell also aggressively pursued a mitigation strategy focusing on his mental health. Dr. Dale Watson, a neuro-psychologist, ran a battery of 45 to 50 tests on Sowell at the Cuyahoga County Jail lasting approximately 19 hours. (Tr. 9551). Dr. Watson found that Sowell had moderate brain dysfunction. (Tr. 9554). He concluded that Sowell's full-scale IQ was 86, in the 18th percentile of the population and what Watson described as "low average." (Tr. 9587). Watson testified that Sowell had likely suffered a neurological

event at some point that resulted in a traumatic brain injury, impairing his cognitive functioning. (Tr. 9596-9598).

Dr. George Woods, a neuro-psychiatrist, interviewed Sowell three times in the Cuyahoga County Jail from June-August of 2010. (Tr. 10560). In his 57-page report, Woods diagnosed Sowell as suffering from (1) Obsessive Compulsive Disorder (OCD), severe, chronic, with sexual obsession; (2) Post Traumatic Stress Disorder (PTSD); (3) Psychosis, Not Otherwise Specified; and (4) Cognitive Disorder, Not Otherwise Specified. (Tr. 10562-10567). Woods testified that a heart attack Sowell suffered while shoveling snow in February 2007 resulted in a deprivation of oxygen to his brain that impaired his cognitive functioning and hindered his ability to conform his conduct to the requirements of the law. (Tr. 10609-10657).

In rebuttal, the State called Dr. Diana Goldstein, a neuro-psychologist. Dr. Goldstein reviewed the reports of Drs. Watson and Woods as well as Sowell's military, school, and hospital records. (Tr. 11238-11240). Dr. Goldstein found no evidence that Sowell had ever complained of any cognitive dysfunction, no documentation of any psychiatric problems, and no evidence of any cognitive or psychiatric disorder. (Tr. 11245-11246). Dr. Goldstein noted that previous evaluations had specifically ruled out cognitive disorders or depression based on Sowell's own repeated statements that he had no problems with thinking. (Tr. 11246). On his admission to the hospital immediately following his 2007 heart attack, Sowell scored a perfect 15 out of 15 on the Glasgow coma scale test for cognitive disorders. (Tr. 11250). His oxygen saturation levels were 96 percent. (Tr. 11250). A CAT scan of Sowell's brain done in November 2008 revealed no abnormalities. (Tr. 11247). Based on the evidence, Dr. Goldstein concluded that Sowell had not suffered

any neurologic event that could have compromised his brain functioning following his heart attack. (Tr. 11251). Dr. Goldstein also refused to rule out the possibility that Sowell was malingering during his examination by Dr. Watson. (Tr. 11255-11256).

The State also called Dr. James Knoll IV, a forensic psychiatrist, to review and rebut the conclusions of Dr. Woods. (Tr. 11338). Dr. Knoll found no evidence to support Dr. Woods' conclusion that Sowell had been unable to conform his conduct to the requirements of the law as a result of any cognitive impairment. (Tr. 11379). Dr. Knoll testified that Sowell's repeated instances of luring women into his house to bind, rape, and kill them, and then disposing of the bodies in plastic and in shallow graves, demonstrated "a pattern that strongly suggests very deliberate, purposeful planful actions, as opposed to loss of volitional control or irresistible impulse." (Tr. 11380, 11380-11385). Sowell's behavior was an example of "serial murder in the context of sexual sadism," motivated by an intense anger towards women. (Tr. 11385, 11391).

The jury found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and unanimously recommended a death sentence. The trial court subsequently conducted its own independent weighing of the factors and imposed a sentence of death for each of the 11 murder victims on August 12, 2011. Sowell now appeals his convictions and death sentence.

LAW AND ARGUMENT

Proposition of Law I [As Stated By Appellant]: In a Case Where the Pretrial Publicity is Absolutely Overwhelming, the Trial Court Violates the Accused's Rights to an Impartial Jury Under Article I, Sections 2, 9, 10 and 16 Under the Ohio Constitution and His Federal Constitutional Rights to Due Process and a Fair Trial by Failing to Grant the Accused's Change of Venue Motion.

In his first proposition of law, Sowell argues that the trial court abused its discretion by denying his repeated motions for a change of venue. Sowell's argument is without merit because the proper resolution for a request to change venue is to reserve a final ruling until after the court has conducted a careful and searching voir dire to determine if a fair and impartial jury can be seated. The voir dire in this case revealed that none of Sowell's jurors demonstrated actual bias against him. Moreover, any pretrial publicity was insufficient to create a presumption of prejudice. Sowell's proposition of law is without merit and should be overruled.

1. Legal Standard for a Change of Venue.

"[P]retrial publicity[,] even pervasive, adverse publicity[,] does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). Proof of pretrial publicity alone is therefore not sufficient to compel a change of venue. *State v. Landrum*, 53 Ohio St.3d 107, 116-117, 559 N.E.2d 710 (1990). This is because a defendant's fair trial rights do not require a juror to be totally ignorant of the facts involved. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

An accused seeking a change of venue based on pretrial publicity must demonstrate that at least one juror was "actually biased" by exposure to that publicity. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶ 29. "[A] careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." *Id.* citing *State v. Bayless*, 48 Ohio St.2d 73, 98,

357 N.E.2d 1035 (1976). A trial court may then change venue "when it appears that a fair and impartial trial cannot be held" in that jurisdiction. Crim.R. 18(B); R.C. 2901.12(K).

Any decision on a change of venue rests in the sound discretion of the trial court. Absent a clear showing of an abuse of that discretion, the trial court's decision controls. *State v. Landrum*, 53 Ohio St.3d 107, 116, 559 N.E.2d 710 (1990). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). As this Court has noted:

> "[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias."

State v. Jenkins, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984).

2. The Record Demonstrates that None of Sowell's Jurors Were Actually Biased Against Him.

The trial court conducted an extensive individual voir dire of 200 people over a period of more than two weeks. "The fact that the defense counsel was able to elicit somewhat contradictory viewpoints from these jurors during his examination does not, in and of itself, render the court's judgment erroneous." *State v. Scott*, 26 Ohio St.3d 92, 98, 497 N.E.2d 55 (1986). The relevant standard is whether the trial court is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In making this determination, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a

factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). The trial court personally assessed each of the 200 individual members of the voir dire, and considered their demeanor and the content of their answers. The trial court passed for cause only those jurors who it found to be qualified under *Wainwright v. Witt.*

An examination of the voir dire of each person who sat on Sowell's petit jury reveals that each of them was properly qualified under the standard for jurors in death cases. Sowell does not challenge the seating of any particular juror; he merely alleges that the answers given generally indicate that the venire was biased against him as a result of pretrial publicity. This is not sufficient to show that the trial court abused its discretion by denying the request for a change of venue. Sowell must demonstrate that at least one individual juror was actually biased against him. *Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶ 29.

i. Juror No. 7

Juror No. 7 stated that although she was generally aware of some media coverage of the case, she had heard "really no detail[s] of it, because of the hours that I work anyway, so I really don't get to see too much TV * * *." (Tr. 1330). She agreed that she could put aside anything she may have heard previously and decide the case based solely on the evidence presented in court. (Tr. 1331). She also indicated that she had no problem following the court's instructions regarding the weighing of mitigating and aggravating circumstances, that she would hold the State to its burden of proof, and that she would consider each possible sentence if the trial proceeded to the mitigation phase. (Tr. 1333-1335). Both parties passed Juror No. 7 for cause. (Tr. 1337, 1346).

ii. Juror No. 11

Juror No. 11 stated that she had not formed any opinions about the case because in her job capacity as a nurse, "I don't really watch the news all that much * * *." (Tr. 3985). She indicated that she would be able to impose the death penalty "if all the evidence is substantiated" and would likewise consider all of the life options. (Tr. 3987-3988). Both parties passed Juror No. 11 for cause. (Tr. 4003).

iii. Juror No. 20

Juror No. 20 was a college student away at school in New York when the media first reported the discovery of the bodies. (Tr. 1502). She stated that she would "definitely" be able to set aside what she knew because "I don't feel I know very much anyway * * *." (Tr. 1503). She had indicated on her questionnaire that she had formed no opinion on the death penalty and stated that she would be able to consider all sentencing options fairly. (Tr. 1504-1508). Both parties passed Juror No. 20 for cause. (Tr. 1518).

iv. Juror No. 24

Juror No. 24 stated that although she had heard of the case on the news, she was skeptical of the media in general and "so I don't think it would be appropriate to form an opinion without knowing the facts * * *." (Tr. 1594). She had also stopped watching the news prior to trial in anticipation that she might be called as a juror and said that she would change the channel if she saw a story about the case. (Tr. 1601-1602). She affirmed that she could put aside anything she may have heard outside the courtroom and decide the case based only on the evidence. (Tr. 1594). She indicated that she would consider all the life options and would not vote automatically in favor of the death penalty. (Tr. 1620).

The trial court passed Juror No. 24 for cause after determining in its discretion that she would give all sentencing options fair consideration. (Tr. 1623).

v. Juror No. 28

Sowell points to Juror No. 28's statement that as a result of things he may have heard in the media, he knew "[n]ot much more than was already said here in court, but enough to be scared." (Tr. 4086). Sowell fails to mention, however, that Juror No. 28 immediately followed up by saying that he "really didn't form much of an opinion" about the case based on those media reports. (Tr. 4086). Juror No. 28 explained that the reason he was afraid was not because of anything he had heard about the facts of the case, but that because of his work with the Veterans Administration, he might have felt uncomfortable ethically judging a veteran of the U.S. military if there were mental health issues in the case. (Tr. 4086-4087). Despite that specific concern, Juror No. 28 expressed confidence that he would have no problem sitting on Sowell's jury and deciding the case without regard to any outside knowledge. (Tr. 4090).

Sowell also points to Juror No. 28's participation in a community focus group as evidence that he was biased. During questioning, however, Juror No. 28 indicated that he had only attended one meeting where he expressed concern for Polish women who had been victims of domestic violence but were afraid to go to the police because they were poor and did not speak English. (Tr. 4105-4106). This is not evidence that Juror No. 28 was at all biased against Sowell as a result of pretrial publicity. Juror No. 28 stated that he had no inclination as to whether Sowell was guilty and that he both understood and agreed that Sowell was presumed innocent. (Tr. 4108-4109). Sowell also points to Juror No. 28's statement that "I never heard any question that he's not guilty" as evidence of bias. But this

statement on its face demonstrates Juror No. 28's impartiality and his willingness to follow the law by accepting that Sowell was not guilty unless the prosecution could prove otherwise. Sowell's attorneys were able to question Juror No. 28 further on this point:

MR. PARKER:	I want to make sure I understand. You've never heard any question that he's not guilty.
JUROR NO. 28:	Right.
MR. PARKER:	So if I understand you believe he's guilty.
JUROR NO. 28:	This is what I didn't say (sic).
MR. PARKER:	Okay. I just want to make sure I understand. Let me ask you this: Given what you know about the situation, do you think he has any burden to prove that he's not guilty?
JUROR NO. 28:	I understand that he doesn't have any, that he is perceived as innocent until he will be proved guilty.
MR. PARKER:	That's what the law says.
JUROR NO. 28:	And I understand that, and I fully understand that.
MR. PARKER:	But I'm asking for your opinion, not what the law is.
JUROR NO. 28:	That is exactly my opinion.

(Tr. 4108-4109).

The trial court denied Sowell's challenge for cause after concluding that Juror No. 28 had indicated he would follow the law and consider all possible sentencing options. Pretrial publicity was not a concern during the questioning of Juror No. 28 and Sowell did not even raise it as an issue during his challenge for cause. (Tr. 4123-4124).

vi. Juror No. 34

Juror No. 34 stated that he had heard some "basics" about the case but had not listened to or read anything in depth. (Tr. 1745-1746). He did not read the newspaper and

saw only the beginning of nightly local news broadcasts. (Tr. 1755). He agreed that he would put any such information aside and deliberate based solely on the evidence presented. (Tr. 1746, 1758). He indicated that he could follow the law and impose either a life or death sentence depending on the weighing of the aggravating and mitigating factors. (Tr. 1754). Although he initially indicated that he expected Sowell to provide evidence on his own behalf, after hearing additional instructions, he agreed that Sowell had no burden of proof at any phase. (Tr. 1766).

The trial court denied Sowell's challenge for cause, finding that Juror No. 34 was no different from other jurors who heard some general details about the case but agreed to set any initial impressions aside and hear the case impartially on the merits. (Tr. 1769). While Juror No. 34's initial answers regarding the burden of proof may have been grounds for exclusion for cause, a trial court can rehabilitate a prospective juror and determine that he can serve without bias, even if he initially falls under one of the criteria for disqualification for cause. *Berk v. Matthews*, 53 Ohio St.3d 161, 168-169, 559 N.E.2d 1301 (1990); see also R.C. 2313.42(J).[3] The trial court properly exercised its discretion regarding Juror No. 34's subsequent answers given after he heard more explanation of the relevant legal issues. Juror No. 34 was not actually biased against Sowell based on the record.

vii. Juror No. 38

Juror No. 38 indicated that he had "not really follow[ed] the case that much" and that he had not formed any opinion about it. (Tr. 1900, 1909). He stated that as a juror, he would be able to ignore what little information he had heard outside of court. (Tr. 1901). He also agreed that he could recommend either a death or a life sentence depending on the

[3] The Ohio General Assembly has since amended and reclassified R.C. 2313.42(J) as R.C. 2313.17(B)(9).

evidence presented at the mitigation phase, saying, "I wasn't going to suppose anything, anything, until I hear the facts." (Tr. 1903-1904). Both parties agreed to pass Juror No. 38 for cause. (Tr. 1915).

viii. Juror No. 40

Juror No. 40 had almost no pre-trial exposure to publicity surrounding the case. She stated that "I don't really know much," and could recall only that Sowell had been in custody at some point. (Tr. 4136). She had not formed any opinion based on the little news she had heard. (Tr. 4136, 4145). She agreed that she would afford Sowell the presumption of innocence and ignore any outside information. (Tr. 4137). She also indicated that she could keep an open mind on all possible sentences at mitigation. (Tr. 4141). Both parties agreed to pass Juror No. 40 for cause. (Tr. 4152).

ix. Juror No. 58

Juror No. 58, the eventual foreperson, indicated under questioning by the trial court that she had ignored any media coverage of the case: "The information that I have is just hearsay. I never followed it because I really wasn't interested. * * * I just don't know all the details because I didn't -- it wasn't something I wanted to know about." (Tr. 4294). She further stated that she had not formed any opinion about the case because she did not know any of the facts. (Tr. 4295, 4310). She also agreed that she could consider all the possible sentencing alternatives and had no strong opinion at all about the death penalty. (Tr. 4302, 4311). Both parties agreed to pass Juror No. 58 for cause. (Tr. 4320).

x. Juror No. 60

Juror No. 60 had not heard about Sowell's case at all prior to jury selection. Juror No. 60 stated that he watched very little television and that the only information he knew about the case was what the trial court explained to him at the start of jury selection. (Tr. 4413). As a result, he had not formed any opinions about the case: "I don't form opinions about anything unless I have pros and cons, both sides of the equation, after I can have the evidence presented to me on both sides." (Tr. 4414). Juror No. 60 also stated that "regardless of what information is sitting in front of me without any proof, without evidence, without finding out all the various components, I make absolutely no judgment." (Tr. 4415-4416). He indicated his willingness to consider both death and life options at sentencing, saying, "I have absolutely no problem going either side depending on the weight of the evidence." (Tr. 4426).

Sowell's challenge for cause for Juror No. 60 was not related to issues concerning pretrial publicity. Sowell instead argued only that this juror had indicated an unwillingness to consider specific mitigating factors. (Tr. 4441-4442). The trial court denied Sowell's challenge for cause based on Juror No. 60's repeated assurances that he would consider all evidence impartially and without any preconceived notions. (Tr. 4444-4445). The record demonstrates no actual bias by Juror No. 60 against Sowell.

xi. Juror No. 61

Juror No. 61 admitted that she had heard some "basic" information about the case from various news outlets. (Tr. 2379). After further questioning, she explained that this information was limited to the number of victims ("Twelve. Is it twelve? I'm not sure") and a general knowledge that the alleged homicides occurred on the east side of Cleveland. (Tr. 2394). She also stated that she had not formed any opinion as to the ultimate issue of guilt

or innocence. (Tr. 2392-2393). Juror No. 61 indicated mild opposition to the death penalty, saying that "it's not solving the issue" by bringing the victims back, but that she could set that opposition aside and consider all options including the death penalty at sentencing. (Tr. 2383-2384). Both parties passed for cause. (Tr. 2401-2402).

Juror No. 61 initially sat on Sowell's petit jury following the close of voir dire. The trial court later excused Juror No. 61 prior to the beginning of any deliberations because of a medical issue that arose suddenly during closing arguments. (Tr. 9296). Sowell therefore cannot point to Juror No. 61 to demonstrate that he suffered any actual bias. To establish a showing of actual bias, Sowell must show that the biased juror "either participated in the jury's deliberations or 'chilled' deliberation by the regular jurors." *U.S. v. Olano*, 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Sowell has made no such showing regarding Juror No. 61.

xii. Juror No. 62

Juror No. 62 did not read the newspaper but had heard some basic information about the case from nightly news broadcasts. (Tr. 2100-2101). She could not remember specifics beyond the fact that police had found some bodies buried in someone's yard. (Tr. 2110). She remembered initially hearing about the case because she lived on Imperial Avenue about 30 years earlier. (Tr. 2110-2111). She stated that she had not come to any opinion about Sowell's guilt because "I don't know anything about him," and wanted to wait to hear the evidence before coming to any conclusions. (Tr. 2111-2113). She did not recognize Sowell when she first saw him at the start of voir dire. (Tr. 2112). She agreed that she would be able to put aside anything she had heard and decide the case based only on the evidence admitted in court. (Tr. 2101).

The trial court denied Sowell's challenge for cause to Juror No. 62. (Tr. 2130-2131). The trial court found that Juror No. 62 had no more information as a result of pretrial publicity than any other juror. (Tr. 2131). She also understood that the burden of proof rested only on the State and agreed that she would consider all possible sentencing options. (Tr. 2116-2119, 2131). There is no evidence in the record to suggest that Juror No. 62 was actually biased against Sowell.

xiii. Juror No. 81

Juror No. 81, originally the first alternate, admitted to seeing some headlines about the case in the newspaper but had not read any of the articles. (Tr. 2468). He stated that he did not have any opinions about the case from the small amount of information he had seen. (Tr. 2468-2469). He agreed that he would be able to set all of that to the side when deliberating as a juror. (Tr. 2469). Juror No. 81 indicated that he was opposed to the death penalty, but promised that he would follow the law and impose a sentence based on an impartial weighing of the evidence presented during mitigation. (Tr. 2471, 2473). Both parties passed for cause on Juror No. 81. (Tr. 2481).

3. Where No Jurors Demonstrate Actual Bias, a Trial Court's Denial of a Defendant's Motion for Change of Venue is Proper.

Sowell's first proposition of law must fail because he cannot demonstrate actual bias by any juror. Ohio law is clear that when confronted with a motion for a change of venue, a trial court's best option is to reserve ruling until a careful and searching voir dire is used to determine whether a fair and impartial jury can be seated within the jurisdiction. *State v. Bayless*, 48 Ohio St.2d at 98, 357 N.E.2d 1035. The record reveals that every person who sat on Sowell's petit jury gave repeated and explicit assurances on the record that he/she had either not heard any significant details regarding the case or would set such

information aside and judge the case impartially based solely on the evidence presented. Sowell challenged only five of his eventual jurors for cause. Three of those five challenges – Juror Nos. 24, 34, and 60 – were based on other answers the jurors had given during voir dire unrelated to pretrial publicity.

Sowell argues that this Court should disbelieve the explicit assurances of the jurors that they would impartially decide the case based on the facts presented in court. Merit Brief of Appellant, p. 11-12. This was a question of fact for the trial court to resolve: whether each juror meant what he or she said. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 172, citing *State v. Jones*, 91 Ohio St.3d 335, 339, 744 N.E.2d 1163 (2001). As the trier of fact, the trial judge was entitled to accept the specific assurances that every juror had given that he or she would follow the law and set aside anything the juror may have heard outside of court. See *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶ 38 (trial court was entitled to accept a juror's assurance that she would decide case based solely on the evidence). A trial court does not abuse its discretion in denying a challenge for cause where the jury's testimony substantially supports the trial court's findings. *State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972).

Sowell has offered no evidence to demonstrate any actual bias by a juror and his general references to pervasive media coverage are insufficient to find that the trial court abused its discretion. This is particularly true where the trial court was well aware throughout Sowell's pretrial proceedings of the extent of the media coverage and noted that it had considered such coverage in its journal entry denying Sowell's motion for a change of venue. See Journal Entry of 6/2/2010.

4. Any Pretrial Publicity Is Insufficient to Presume Prejudice.

Sowell can avoid the "actual bias" requirement only through the narrow exception for presumptive prejudice. *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4, 739 N.E.2d 749. Proof of actual juror bias is not required, and juror bias may be presumed, in the rare case where "inflammatory, prejudicial pretrial publicity * * * so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community." *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980).

Sowell cannot meet this exceptionally high burden merely through conclusory allegations that the media coverage of his case was extensive. Sowell's first proposition is analogous to and controlled by *State v. Lundgren*, 73 Ohio St.3d 474, 1995-Ohio-227, 653 N.E.2d 304. Jeffrey Lundgren received the death penalty for the 1989 cult killings of a family of five in Lake County. *Id.* at 476-477. This Court described the extent of the media coverage in his case as follows:

> "According to The Plain Dealer, the Lake County Prosecutor publicly asserted that the members of the Lundgren group were the 'most inhuman people this county has ever seen, and they are going to die in the electric chair.' According to the second addendum, from January through August 9, 1990, the Lake County News Herald printed a total of two hundred twenty-seven Lundgren-related items, including sixty-one front page articles. The Plain Dealer, widely circulated in Lake County, published some one hundred twenty-three articles, including thirty on the front page. In that same period, Cleveland television and radio stations frequently ran news and background stories about the murders. For example, Lundgren asserts that Channel 43 had sixty-six stories, Channel 5 had one hundred twelve stories, and Channel 8 had one hundred sixty-nine stories. Although publicity diminished rapidly after January 1990, media reports concerning the disposition of charges against Lundgren's followers kept the 'Kirtland Massacre' case in the public eye."

Id. at 478. Although Sowell's case received considerable media coverage, the breadth and depth of that coverage was no greater than in *Lundgren*. Sowell's argument for a change of

venue is also substantially weaker than Lundgren's because Lundgren's venire was drawn from Lake County, a much smaller jurisdiction than Cuyahoga County with fewer available media outlets.

A review of the voir dire proceedings reveals no evidence of any pervasive prejudice or bias against Sowell. More than 19 months passed between the initial discovery of the bodies on October 29, 2009 and the beginning of voir dire on June 3, 2011. The individual voir dire demonstrated that the majority of the venire who did recall media accounts about the case was unable to recall specific details. Where jurors admit to some media exposure but are unable to recall the content of any reporting, it is strong evidence that the effects of pretrial publicity have dissipated over the duration of time before trial. *State v. Garvin*, 197 Ohio App.3d 453, 2011-Ohio-6617, 967 N.E.2d 1277, at ¶ 48 (4th Dist.2011).

Moreover, the trial court took additional steps to protect Sowell's right to a fair trial during voir dire. In *State v. Landrum*, 53 Ohio St.3d 107, 117, 559 N.E.2d 710, 722 (1990), the media "extensively reported" the crime and even reported "possibly prejudicial information" that was not admitted as evidence. *Id.* Furthermore, "virtually all of the prospective jurors had read or heard media reports about the case." *Id.* Despite the pretrial publicity, this Court found that the trial judge's use of questionnaires for prospective jurors and cautioning of both counsel and jurors to avoid the media was sufficient to protect the defendant's right to a fair trial. *Id.*

The trial court in this case took identical steps by distributing jury questionnaires to determine the extent of the prospective jurors' exposure to the media. The questionnaire specifically asked whether the juror "recall[ed] having read, see[n] or heard media accounts reflecting [Sowell's case]?" (Jury Questionnaire, at p. 10). The trial court then

individually questioned each juror as to pretrial publicity and allowed both parties to do the same. The trial court passed for cause only those jurors whose questionnaires and answers given during individual voir dire demonstrated that each juror did not have substantial knowledge regarding Sowell's case prior to trial. The court also took steps to limit media access during trial, including restricting the use of recording devices and issuing a gag order on the parties well in advance. (Tr. 14). As a result of that gag order, there is nothing in the record comparable to the widely-reported statements of the Lake County Prosecutor that Jeffrey Lundgren was "inhuman" and would "die in the electric chair." *Lundgren* at 478. These steps were more than sufficient under *Landrum* to protect Sowell's right to a fair and impartial jury in light of any media coverage.

Finally, Sowell has failed to provide this Court with a sufficient factual basis to support his argument. Sowell relies entirely on conclusory allegations that the coverage was "frenzied," "unabated," "heated," and "an unmitigated media circus," but makes no attempt to substantiate these claims.[4] Merit Brief of Appellant, p. 5-7. Sowell's trial

[4] As evidence of pervasive media coverage, Sowell claims that a prior judge who presided over his case for approximately a week before recusing himself shared Sowell's 2005 Sexual Predator Evaluation with a reporter. Merit Brief of Appellant, p. 5. Sowell claims that this report "was supposed to be confidential * * *." Id. The prior judge in fact gave a copy of the document to the reporter over a month before he was assigned to this case. (Tr. 280). Under Ohio law, the report was a public record because it had been submitted to the court as an exhibit in a 2005 hearing on whether Sowell would be classified as a sexually-oriented offender pursuant to House Bill 180 after his release from prison. (Tr. 278-279). Exhibits used in a pretrial hearing become public records once they are introduced in court as exhibits. *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 728-729, 761 N.E.2d 6 (1st Dist.2001); see also *State v. Hall*, 141 Ohio App.3d 561, 567, 2001-Ohio-4059, 752 N.E.2d 318 (4th Dist.2001) (psychiatric evaluations of a defendant submitted to the trial court for purposes of determining competency are public records). Moreover, the Sexual Predator Evaluation itself, which is part of the record before this Court as State's Exhibit 459, noted that Sowell had given written informed consent that the report was "non-confidential." (Tr. 172). Sowell is also incorrect in claiming that the prior judge recused himself because of controversy about the evaluation. Merit Brief of Appellant, p. 5.

counsel had already presented all of the evidence of media coverage to the trial court in a 160-page appendix attached to their *First Amended Motion for Change of Venue Based on Adverse Pretrial Publicity* on May 20, 2010 that documented various news articles about the case. The trial court stated in denying Sowell's motion that it was "aware that there has been extensive media coverage about this case * * *." See Journal Entry of 6/2/2010. Sowell provides no evidence that the level or tone of publicity in his case was unusual for a serial murder trial.

Aggravated murder cases, by their nature, involve the reporting of grisly details of a crime and provoke deep emotional reactions among the members of a community. This case was not fundamentally different than the many other death penalty cases in which this Court has found no error in the trial court's refusal to change venue even where the media coverage was extensive and the facts of the crime were extraordinarily gruesome or infamous. See *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242 (defendant murdered his girlfriend, her 7-year old son, and a college student he had taken hostage); *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173 and *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504 (co-defendant brothers committed a home invasion robbery in which they shot eight people, killing a 17-year old girl and a 3-year old girl); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215 (member of the Aryan Brotherhood serving a life sentence for aggravated murder killed two other inmates during the 1993 prison riot at the Southern Ohio Correctional

---

The prior judge voluntarily recused himself from this case because of his longtime public opposition to the Cleveland Police Department's "straight release" policy, whereby suspects are arrested and then released while awaiting charges. (Tr. 286). Police had released Sowell from jail under this policy after his arrest for the attack on Gladys Wade in 2008. (Tr. 6760). The prior judge's recusal was unrelated to Sowell's Sexual Predator Evaluation.

Facility); *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637 (defendant murdered his estranged wife and three members of her family, including a 2-year old girl).

Sowell cannot demonstrate that the community was presumptively prejudiced against him, nor can he show any actual bias amongst the jurors. The trial court did not abuse its discretion by denying Sowell's motion to change venue. Sowell's first proposition of law is without merit and should be denied.

Proposition of Law II [As Stated By Appellant]: A Trial Court Violates the Defendant's Rights under the Sixth and Eighth Amendments as well as the Due Process Clause When it Prevents or Unduly Restricts the Defense From Questioning Prospective Jurors About Their Ability to Consider Mitigating Factors.

In his second proposition of law, Sowell argues that the trial court erred by refusing to allow Sowell at individual voir dire to question each member of the venire as to their willingness to consider specific mitigating factors. First, the trial court's decision to prohibit such questions was necessary to prevent Sowell from trying his mitigation case to individual jurors during voir dire before they had heard any evidence or been instructed on the law. This Court has repeatedly held that capital defendants have no right to question the members of the venire as to individual mitigating circumstances. Second, Sowell cannot demonstrate that this restriction prejudiced him by resulting in the seating of an unqualified juror.

1. Standard of Review.

"[T]he trial judge has discretion over the scope, length, and manner of voir dire." *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, at ¶ 46. The trial court may impose any reasonable limits upon the voir dire of prospective jurors it deems necessary because "[t]he trial judge has the right to control all proceedings and to limit the

trial to relevant and material matters with a view toward the expeditious and effective ascertainment of the truth regarding the matters at issue." *State v. Bridgeman*, 51 Ohio App.2d 105, 109-110, 366 N.E.2d 1378 (8th Dist.1977). The trial court's judgment will be reversed only upon a showing that the trial court abused its discretion. *Jenkins*, 15 Ohio St.3d at 186, 473 N.E.2d 264. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

2. The Trial Court Properly Prohibited Sowell From Attempting to Try His Mitigation Case to the Venire.

The trial court exercised its discretion over the scope of voir dire in this case by preventing the parties from asking about each prospective juror's willingness to consider a list of specific mitigating factors. This Court has previously explained why specific mitigating factors should not be injected into the voir dire phase:

> "Lundgren argues that the potential jurors could not meaningfully say whether they would properly consider and weigh the statutory mitigating factors without knowing what the factors were. However, weighing aggravating circumstances against mitigating factors is a complex process. Jurors weigh mitigating factors together, not singly, and do so collectively as a jury in the context of a penalty hearing. Realistically, jurors cannot be asked to weigh specific factors until they have heard all the evidence and been fully instructed on the applicable law. Moreover, 'evidence of an offender's history, background and character' that is not found to be mitigating 'need be given little or no weight against the aggravating circumstances.' *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus. We find that the trial court exercised appropriate discretion in not allowing jurors to be asked if they would consider specifically named mitigating factors."

Lundgren, 73 Ohio St.3d at 481, 653 N.E.2d 304. The Supreme Court of Nevada has also recognized that if a defendant

> "were allowed to ask such a question, he would be able to read how a potential juror would vote during the penalty phase of the trial. This goes

> well beyond determining whether a potential juror would be able to apply the law to the facts of the case. We do not read either the *Morgan* or the *Witherspoon* decisions to allow for one side to gain such an unfair advantage."

Witter v. State, 112 Nev. 908, 915, 921 P.2d 886 (1996).

Although Sowell phrases his argument as necessary to qualify his jury pursuant to *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), what Sowell truly sought through such questioning was to try his entire mitigation case to members of the venire one-by-one during voir dire. Sowell could then argue that any juror who felt that his specific case was not compelling must be excused for cause, thereby preemptively guaranteeing himself a jury that would look favorably on the specific mitigating circumstances he chose to present. Sowell fails to cite a single case that suggests he has a right to do so and this Court has repeatedly held the opposite.

3. Sowell Had No Right to Question the Members of His Venire as to Specific Mitigating Factors.

"During voir dire, a trial court is under no obligation to discuss, or to permit the attorneys to discuss, specific mitigating factors." *State v. Jones*, 91 Ohio St.3d 335, 338, 2001-Ohio-57, 744 N.E.2d 1163. This Court has consistently adhered to this rule for decades. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶ 80 (trial court properly precluded defense attorneys from questioning prospective jurors about a willingness to consider mental retardation as a mitigating factor because "[p]arties in a capital case are not entitled to ask about specific mitigating factors during voir dire"); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, at ¶ 36 ("*Morgan v. Illinois* does not require judges to allow individual voir dire on separate mitigating factors") (citations omitted); *State v. Bedford*, 39 Ohio St.3d 122, 129, 529 N.E.2d 913 (1988) (trial

court did not abuse its discretion by refusing to "permit defense counsel to inquire of prospective jurors whether they would find as mitigating factors Bedford's alcohol abuse and his father's murder"). Sowell makes no attempt to distinguish these cases or explain why they should not control in this case.

Sowell claims that his inability to question the jurors as to specific mitigating circumstances was unfair because the jurors were already aware of the aggravating circumstances. Merit Brief of Appellant, p. 18. But it was defense counsel who requested that the jurors be informed of the specific aggravating circumstances in the written questionnaires that the trial court distributed prior to individual voir dire. The trial court's original proposed question read, "[W]ould you be more likely to impose the death penalty in a case involving more than one victim? Why?" (Tr. 894). Sowell objected to this question and requested that the trial court amend it to specifically apprise jurors of more details regarding the aggravating circumstances:

> "Judge * * * I think your question is a little vague. And I think when we are selecting a jury, we need to know whether they can fairly consider either the death penalty, or life imprisonment under the particular facts that would have been proven to them by this point in the trial. So I think we need to tailer [sic] the question to one involving 11 victims on 11 separate dates over a two and a half year period."

(Tr. 895). The trial court agreed and changed the juror questionnaires to reflect the specific information about the aggravating circumstances based on Sowell's request. (Tr. 954-955). The final version of the question that the jurors answered in their written questionnaires read as follows:

> "In your opinion, is the death penalty the only appropriate sentence in a case involving the purposeful killing of 11 people alleged to have been killed at separate times over a two and one half year period or would a sentence of life in prison without the possibility of release also be an appropriate sentence."

(Tr. 955). The questionnaire also asked if 25-life and 30-life were appropriate sentencing options "in a case such as described above * * *." (Jury Questionnaire, at p. 31). Sowell therefore cannot claim error as a result of knowledge that he insisted the jurors have prior to voir dire. Under the doctrine of invited error, "[a] party cannot take advantage of an error he invited or induced." *State v. Cassano*, 96 Ohio St.3d 94, 105, 2002-Ohio-3751, 772 N.E.2d 81, at ¶ 64. Sowell's second proposition of law is without merit and should be overruled.

Proposition of Law III [As Stated By Appellant]: A Trial Court Compromises the Fairness of the Accused's Trial and Renders His Death Sentence Unreliable When It Fails to Excuse for Cause Jurors Who Indicate That They Cannot Follow the Law as Instructed.

In his third proposition of law, Sowell argues that the trial court erred by failing to excuse for cause all six members of the venire on whom he eventually used his peremptory challenges. The record reflects, however, that not one of these jurors was an automatic vote for the death penalty in a potential mitigation phase. Sowell acknowledges that all six of the potential jurors on which he exercised his peremptory challenges stated that they could follow the law, but attempts to dismiss the importance of this as a mere "abstraction." Merit Brief of Appellant, p. 34. These statements to the trial court were not meaningless abstractions; they were repeated and explicit assurances that were sufficient to justify the trial court's discretionary determination that each juror was not constitutionally prohibited from sitting on this case.

1. Standard of Review.

A prospective juror in a capital case may be excused for cause if that juror's views on capital punishment "would 'prevent or substantially impair the performance of his

duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.E.2d 581 (1980); see also *State v. Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), paragraph three of the syllabus. In the capital context, this means that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

To show reversible error under *Morgan*, Sowell must demonstrate that the challenged juror was an automatic vote for the death penalty. It is not sufficient for Sowell merely to argue that a juror was predisposed towards the death penalty. "A trial court does not abuse its discretion in denying a challenge for cause if a juror, even one predisposed in favor of imposing death, states that he or she will follow the law and the court's instructions." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 40. Most jurors are likely predisposed towards either a death or a life sentence. To demonstrate prejudicial error under *Morgan*, Sowell must prove that the trial court abused its discretion by failing to excuse a juror who would categorically vote to recommend a death sentence if the case proceeded to a mitigation phase. *"Morgan* requires only that a juror be excluded if he would automatically 'vote for the death penalty without regard to the mitigating evidence'* * *." *Bowling v. Parker*, 344 F.3d 487, 520 (6th Cir.2003).

A trial court's ruling on a challenge for cause will not be overturned on appeal "unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Williams*, 79 Ohio St.3d 1, 8, 679 N.E.2d 646

(1997). An abuse of discretion is more than an error of law and "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

2. None of the Sowell's Six Peremptory Challenges Were Automatic Votes for the Death Penalty.

a. Juror No. 13

Sowell refers to Juror No. 13 as one of his six peremptory challenges, all of whom he claims the trial court should have excused for cause. Merit Brief of Appellant, p. 34, 38. Sowell does not discuss the voir dire of Juror No. 13 or explain why the trial court's decision to pass this juror for cause was an abuse of discretion.

Juror No. 13 repeatedly stated that she could impose either a death or a life sentence depending on her weighing of the aggravating and mitigating factors. (Tr. 4017, 4019, 4022, 4028). She indicated that on a scale of 1 to 10, her support for the death penalty was an 8, "[b]ecause I would say I'm definitely more than halfway in the strong, but I wouldn't say a 9 or a 10. I would not." (Tr. 4021). She also stated that she would only vote for the death penalty if the State had met its burden of proof. (Tr. 4021). When defense counsel asked her if she would have a hard time considering a life sentence in an extreme case of multiple murders, she replied, "yes, there are multiple victims, but what are the mitigating and what's the whole picture? I wouldn't want to make an assumption on that without the whole picture." (Tr. 4036).

The trial court properly overruled Sowell's challenge of Juror No. 13 for cause, finding that, "[s]he did say she would want to hear everything before making a decision. So,

I think she would fairly consider all evidence before making a decision * * *." (Tr. 4040). Juror No. 13 was not an automatic vote for the death penalty and the trial court did not abuse its discretion by passing Juror No. 13 for cause.

b. Juror No. 21

Juror No. 21 agreed that he would follow the law and impose a death sentence only if the State met its burden of proof in the mitigation phase. (Tr. 1522). He stated that he would consider all possible sentencing options, and that while the death penalty was "an option to be considered," that it was not necessarily appropriate in every case. (Tr. 1527-1528). He also stated that he would fully consider all mitigating evidence from any source. (Tr. 1532).

Sowell claims that Juror No. 21's answers to the written questionnaire contradicted his statements during individual voir dire that he could consider all the possible sentencing options. Merit Brief of Appellant, p. 31. As the trial court recognized when considering Sowell's challenge for cause to another juror, however, the questions that Sowell had insisted the trial court include in the written questionnaire were confusing to many of the jurors, who had not received any instructions or guidance at the time they filled out the questionnaires:

> "With respect to the death penalty issue, I do think that his answers were at least clear. Again, there is some inconsistency I think on most jurors, because of the way the questionnaire is phrased, and realizing now that that may not have been the best way to structure those particular questions."

(Tr. 1710).

The confusion resulted from the fact that Sowell had insisted that the questionnaire should specifically tell the jurors what the aggravating circumstances were in his case. (Tr. 895). Sowell did not seek to ask the jurors anything about mitigating circumstances until individual voir dire, after the jurors had filled out their questionnaires. (Tr. 1915). The jurors thus filled out their written questionnaires responding to questions that placed the aggravating circumstances before them, but without any reference to any mitigating factors to weigh them against. The effect of this was to induce jurors more favorable to the death penalty to be more likely to answer "no" on their questionnaires when asked if they could consider a sentence of 25 years to life imprisonment for a man who had murdered 11 innocent women. With the aggravating circumstances proven and no explanation as to what mitigation even was, a substantial number of jurors were unwilling to agree to a sentence of roughly 2 years per each aggravated murder victim. This enabled Sowell to argue that a large portion of the venire should be excluded for cause because they had stated that they could not consider the life sentencing options, in response to questions Sowell had included in the questionnaire that artificially placed only the aggravating circumstances before the jurors with no mention of possible mitigation.

The trial court later sustained an objection to this strategy of questioning during voir dire:

> "I believe it is a misleading question, because it is basically jumping from the first phase, right to the penalty, without considering any mitigation or anything of that nature. So basically, you're asking him in a case where there is very serious allegations of 11 murders, would you impose a death penalty. * * * you don't get to the penalty until you go through the procedure of the second phase. And we're skipping that procedure of the second phase, which is to weigh the aggravating circumstance and mitigating factors, because as heinous as the crimes alleged may be, there could still be sufficient mitigation that would argue totally against the death penalty."

(Tr. 1697). Sowell intended for such questions to lower the bar for exclusion of jurors who were more favorable to the death penalty. Because of this confusion in the questionnaires, the trial court chose to rely more heavily on each jurors' answers during individual voir dire and the trial court's impressions of that juror's ability to be fair and impartial rather than the written questionnaires.

The Supreme Court of the United States has recognized that, "[p]rospective jurors represent a cross section of the community, and their education and experiences vary widely. Also unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand." *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). As a result, jurors "cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." *Id.* at 1039.

With respect to Juror No. 21, the trial court found that his answers during individual voir dire, given after he had received additional instructions on the law, revealed that he was not an automatic vote for the death penalty and that he indicated he would follow the law:

> "Yes, I would agree that there is still some confusion over these questions and the -- regarding the second phase and considering the life alternatives, and who has the burden of proof, because that's not clear to many of the jurors. This juror clearly said that he agreed that it was the State's burden to prove the aggravating circumstances outweigh the mitigating factors, and then he also said, I believe, that he expected the defendant to prove the mitigation in the section phase. So, I think we're getting a little bit too semantical with some of the questions. Leading questions are being asked and jurors are providing the answers to the best of their ability. Overall my impression of this juror is that he would consider all the alternatives fairly, death or life, should the case go to the second phase."

(Tr. 1537). The trial court was in the best position to determine the juror's demeanor and whether he was qualified to serve. *Uttecht v. Brown*, 551 U.S. at 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014. Sowell provides no explanation as to why the trial court's finding was arbitrary or against the substantial weight of the testimony.

Sowell also focuses on Juror No. 21's answer of "yes" when defense counsel asked him, "Would you expect Mr. Sowell to have to prove to you why he should not be given a death penalty sentence if we ever get to that second phase?" (Tr. 1533). The full transcript makes clear, however, that the juror was simply confused as to the legal semantics of defense counsel's questioning. Juror No. 21 stated prior to this exchange that he would vote to impose a life sentence if the State did not prove that the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt. (Tr. 1531). When defense counsel asked if Juror No. 21 believed Sowell would have to "prove to you why he should not be given a death penalty sentence," Juror No. 21 initially asked defense counsel to repeat the question a second time. (Tr. 1532). Defense counsel acknowledged that "it's a complicated question." (Tr. 1532). The trial court also noted this confusion in denying Sowell's challenge to Juror No. 21 for cause. (Tr. 1537).

The mere fact that an attorney is able to confuse a juror into giving a contradictory answer does not require the exclusion of that juror for cause. *State v. Scott*, 26 Ohio St.3d at 98, 497 N.E.2d 55. Juror No. 21 repeatedly stated that he understood the State's burden of proof and that he would be able to consider all life sentencing options. The trial court did not abuse its discretion by passing Juror No. 21 for cause.

c. Juror No. 22

Juror No. 22 stated that while she had heard about the case on the news, "I don't know really any fine details" and that she had not followed the case at all. (Tr. 1544-1545). She had never discussed it with any of her friends. (Tr. 1555). She admitted that although the news accounts she had seen had created an impression that Sowell was the perpetrator, she would set aside any information she might have heard out of court and decide the case based solely on the evidence presented in court because "I know it would be the right thing to do, and yes, I would." (Tr. 1545, 1548-1549). She reiterated this belief numerous times under questioning from defense counsel. (Tr. 1556-1557). She also stated that she would consider all of the possible life sentences. (Tr. 1547, 1552, 1553). She further agreed when questioned by defense counsel that she would fairly consider the minimum sentence of 25-life, that she "absolutely" would consider all mitigating evidence, and that death was not the only appropriate punishment. (Tr. 1559, 1562).

Sowell again points to Juror No. 22's written questionnaire as evidence that Sowell now claims trumps her answers during individual voir dire. Merit Brief of Appellant, p. 31-32. But defense counsel in fact cleared up any confusion during Juror No. 22's voir dire when he asked her whether she could consider all the possible life sentences. As with many other jurors, Juror No. 22 likewise stated that "the way you just explained it to me, with the second phase of the mitigation, then yes." (Tr. 1567). Defense counsel replied, "[y]ou cleared it up here." (Tr. 1567).

The trial court properly overruled Sowell's challenge to Juror No. 22 for cause. The court found:

> "I don't think there was sufficient basis to question her attitudes with respect to publicity. She did say that she would be able to put her opinions aside and decide this case based on the facts presented in the courtroom. I don't think there was any body language that would indicate that she was trying to say

two different things. I think she was clear that she would put those opinions aside * * *."

(Tr. 1570). Again, the trial court was in the best position to judge Juror No. 22's demeanor and her ability to serve on the jury. This was another instance in which the juror's answers changed after she had heard additional instruction from the trial court beyond the questions Sowell had included in the written questionnaire. The trial court did not abuse its discretion in passing Juror No. 22 for cause where the substantial testimony indicated she was not an automatic vote for the death penalty.

d. Juror No. 23

Juror No. 23 stated that he would consider all three of the life sentencing alternatives at sentencing. (Tr. 1577, 1587-1588). As evidence that Juror No. 23 should have been excused for cause, Sowell points exclusively to his responses in the questionnaire in which he professed his belief in "[a]n eye for an eye seems fair depending on the circumstances, but I think it's on a case-by-case basis." (Tr. 1583). When questioned by defense counsel as to whether he believed that "if you're found guilty, and you've taken a life, then your life must be taken, correct?" Juror No. 23 replied, "No * * * I said on a case-by-case circumstance." (Tr. 1586-1587). Sowell acknowledges that Juror No. 23 stated that "he had meant that the death penalty should be imposed on a case-by-case basis." Merit Brief of Appellant, p. 33. When asked in his questionnaire what would be important to him in knowing whether to impose a death sentence, Juror No. 23 had replied, "[e]verything." (Tr. 1589).

This Court has previously found that a juror who "believed in the death penalty as an 'eye for an eye' and would have that mindset if the defendant was found guilty" may not be excluded for cause where the juror "had assured the court that he could listen to the

evidence, follow the court's instructions, and vote for a life sentence if the state failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors." *State v. Trimble,* 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 70. This is exactly the situation that Juror No. 23 presented. There was no basis to excuse Juror No. 23 for cause and the trial court did not abuse its discretion by refusing to do so.

e. Juror No. 36

Juror No. 36 stated that she had heard about the case "in passing" and that she could put aside anything she might have heard if selected as a juror. (Tr. 1804). She agreed that she would keep an open mind and that nothing she may have heard about the case would cause her to prejudge whether or not Sowell was guilty. (Tr. 1808-1809). She had not talked with her family and friends much, if at all, about the case. (Tr. 1818). She also admitted that while she had no opinion of Sowell personally, she did "feel he's guilty" based on what she had seen in the news. (Tr. 1818).

Sowell did not challenge Juror No. 36 for cause based on pretrial publicity. (Tr. 1827). Crim.R. 24(C)(9), however, provides in part:

> "[N]o person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial."

Juror No. 36 gave repeated and explicit assurances that she could set her previously formed opinion aside and decide this case based only upon the evidence submitted in court. (Tr. 1804, 1808-1809). The trial court thus utilized its discretion in determining that the juror

meant what she said in being able to decide the case without regard to any prior information. Sowell did not even raise this issue as part of his challenge to Juror No. 36 and has not demonstrated that substantial testimony supported her exclusion for cause.

With respect to the death penalty, Juror No. 36 stated at 11 separate instances during questioning that she would keep an open mind and would consider all of the life sentencing options in this case. (Tr. 1807, 1810, 1811, 1812, 1813, 1813, 1814, 1814, 1821, 1822, 1826). She continued to adhere to this belief when defense counsel questioned her. (Tr. 1822). Juror No. 36 explained that whether she could impose the death penalty "depends on the crime. It depends on the circumstances." (Tr. 1814).

At the end of her questioning, Sowell's attorneys were able to get Juror No. 36 to give answers that contradicted her previous assurances that she would consider all the life sentences. (Tr. 1824). The trial court then attempted to clarify whether Juror No. 36 could in fact consider all the possible sentencing options. (Tr. 1826). Juror No. 36 again responded that she could. (Tr. 1826). In light of that response, the trial court overruled Sowell's challenge for cause:

> "[T]hat's why I asked her the follow-up question, because I wasn't sure. I thought that's what she did say when you were questioning her. I want to make it clear, again, we're not asking for a decision right now as to which option you're going to choose, based on only -- the only thing that people have heard up to this point is eleven murders, and, you know, potentially three other charges. They all have heard of this case. They don't know the facts of the case, we're asking them to -- it almost seems like to come up with a decision as to which of the life alternatives they would choose, which is, again, they simply have to agree to consider all three. I think she did do that. Other jurors have stated they would not, and have been a lot more emphatic and clear."

(Tr. 1828).

"[I]t is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Jones*, 91 Ohio St.3d at 339, 744 N.E.2d 1163. "As long as a trial court is satisfied, following additional questioning of the prospective juror, that the juror can be fair and impartial and follow the law as instructed, the court need not remove that juror for cause." *State v. Moss*, 9th Dist. No. 24511, 2009-Ohio-3866, at ¶ 11, citing *Berk v. Matthews*, 53 Ohio St.3d at 168-169, 559 N.E.2d 1301. See also *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, at ¶¶ 88-100 (no abuse of discretion where trial court was able to clarify that a potential juror was willing to follow the law in sentencing, after the juror had twice indicated that she could not impose a sentence less than death). Additionally, Sowell had previously argued in response to the State's challenge to another juror that the mere fact that a juror was uncomfortable with one of the sentencing options did not disqualify that jury from service:

> "Judge, this is the type of juror, who obviously she's not crazy about the death penalty, one might even say she doesn't believe in the death penalty, but just because a person has that viewpoint, doesn't mean they cannot sit on this jury, if they would truly weigh the various things they have to weigh, and follow the instructions of law. And she made it very clear, I thought, during my questioning, that she wouldn't like that, but that she would do it. So just because she has the viewpoint that she didn't like the death penalty, she's willing to set that aside and follow the law, and do the process the way she has to do it. And we think she should not go for cause."

(Tr. 1498-1499). Juror No. 36 was likewise clear that while she was uncomfortable with some of the lesser life sentences, she was willing to weigh the mitigating factors and follow the law. The trial court's clarification of the sentencing issue led it to believe that Juror No. 36 could serve on the jury and was not an automatic vote for a death sentence. The testimony does not contradict that finding and the trial court therefore did not abuse its discretion.

f. Juror No. 46

When asked about pretrial publicity, Juror No. 46 stated that although she had heard some information about the case when the bodies were first discovered, "I heard the beginning, then I tuned it out and I really did not listen to what other people said." (Tr. 1942). She explained that she understood that cases can only be decided based on evidence presented in court. (Tr. 1932). When it came to any information she may have heard outside of court, she stated that, "I understand that that's hearsay, and that's what, you know, is reported, but I would be willing to take into fact just what I've learned in the courtroom." (Tr. 1932). With any other opinions, "I could put those aside" and "I would come in with an open mind." (Tr. 1933, 1934). When defense counsel tried to ask Juror No. 46 if it was "going to be difficult for you to put that opinion aside, and view the evidence in this courtroom," she answered five times that it would not. (Tr. 1952).

The trial court denied Sowell's challenge to Juror No. 46 on grounds of pretrial publicity:

> "As far as publicity, this juror said that she could put her opinions aside, leave them at the door. She seemed to accept the responsibility that if she's selected as a juror, it would be her job to decide this case based only on the facts and evidence presented in the courtroom."

(Tr. 1967). This finding is supported by the substantial weight of the testimony through Juror No. 46's numerous and unequivocal assurances that she would have no problem ignoring anything she may have heard outside of court. The trial court did not abuse its discretion by believing what the juror said in her testimony when defense counsel was unable to elicit any answers to the contrary.

Sowell also argues that Juror No. 46's answer on her questionnaire that a convicted murderer "should go straight to death row, with no chance of appeals" was evidence that

Juror No. 46 was an automatic vote for the death penalty. Merit Brief of Appellant, p. 34. Juror No. 46 in fact stated 15 times that she would be open to all the possible sentencing options in this case. (Tr. 1934, 1940, 1940, 1941, 1957, 1957, 1957, 1957, 1958, 1958, 1958, 1958, 1958, 1958, 1958). She specifically agreed under questioning from defense counsel that she would consider the 25-life and 30-life sentencing options. (Tr. 1958).

When asked by the State to explain the change from her answers in the written questionnaire to her answers during voir dire, Juror No. 46 agreed that she did not have any information as to how a capital case worked at the time she filled out her questionnaire. (Tr. 1934-1935). She had answered the questionnaire "in the moment, I was going by the information that I had ahead of time, and that was my feelings. You know, given to me at that exact moment. If I was in a court of law, could I take a step back and just look at the evidence of everything, you know, put my personal feelings aside? Yes, I could." (Tr. 1939-1940). Under questioning by defense counsel, she further explained that she had given these answers "without knowing the evidence * * * [or] other details." (Tr. 1959). When asked if she could remain impartial in light of her support for the death penalty, she replied, "Those are my views, but like I said, if I was chosen as a juror, I would take it as my job, I would take it seriously and I would leave all of that at the door." (Tr. 1960).

The trial court did not abuse its discretion in passing Juror No. 46 for cause. She had been unequivocal that whatever she may have believed prior to the trial, she would decide the case based solely on the evidence. There was no testimony during individual voir dire to support a contrary conclusion, and Sowell therefore cannot demonstrate that her substantial testimony mandated her exclusion for cause.

3. None of the Members of Sowell's Petit Jury Were Automatic Votes for the Death Penalty.

Sowell then argues that the trial court abused its discretion by denying all five of his challenges for cause to those members of the venire who ended up serving on his petit jury. None of these jurors was an automatic vote for the death penalty. As shown above, all of the jurors in this case gave explicit assurances that they would consider all of the possible sentences and would be open to the presentation of mitigating evidence.

a. Juror No. 24

Juror No. 24 stated that she was "pessimistic about the media," and "so I don't think it would be appropriate to form an opinion without knowing the facts * * *." (Tr. 1594). She had not, as Sowell claims, "followed the case in the news." Merit Brief of Appellant, p. 35. She indicated in her written questionnaire that she had actually stopped watching or reading any stories about the case in advance of trial because she knew there was a possibility she might be called as a juror. (Tr. 1600-1601). Anything she may have seen was "just at the time of finding out initially." (Tr. 1601). She stated that she had not formed any belief as to the guilt or innocence of Sowell because she did not have any facts. (Tr. 1603).

Juror No. 24 was not an automatic vote for the death penalty. Even on her written questionnaire, she had stated that the death penalty would only be appropriate in a "few instances," and that it "must be examined very carefully and not applied without very, very just reason (considering all factors)". (Tr. 1605). She further stated that she would consider all the life sentencing alternatives and that the death penalty was not the only appropriate sentence if the jury found Sowell guilty of aggravated murder. (Tr. 1607, 1611). Juror No. 24 actually said that "I would lean towards life" in a sentencing phase. (Tr. 1612).

Juror No. 24 did admit that "I would be more negative toward" the lesser 25-life and 30-life sentences. (Tr. 1612). She then explained, "But not being in that setting, I can't say," and that "I might have a little bit of flexibility * * *." (Tr. 1612, 1613). Under questioning from defense counsel and from the State, Juror No. 24 changed her answer several times as to whether she would consider 25-life. She answered "no" under questioning from defense counsel, and after further explanation from the State, said that she had "changed my opinion on the no," that she "definitely" would consider the life options, and that the sentence depended on the case. (Tr. 1616-1617). After going back and forth several times, the trial court finally explained to her that "we're not asking you to choose a sentence today," and that she was only being asked to "consider all three of those life options," and not "rule out one right off the bat, because that's the way you feel today, and there is nothing that is going to change your mind?" Juror No. 24 then replied, "You really helped clarify it, my answer is not no, it's yes." (Tr. 1620).

The trial court passed Juror No. 24 for cause after finding that her resistance to the 25-life option was a result of her mistaken belief that the court was asking her to choose a sentence during voir dire. (Tr. 1623). "[T]he issue really is not what sentence would the juror choose, it's whether she would, again, fairly consider all alternatives presented, and basically follow the law." (Tr. 1623). After the trial court explained that she merely had to consider all the life options, she stated that this clarified the issue for her and that she could.

The trial court's decision to believe Juror No. 24 was not an abuse of discretion. Sowell had previously argued that a juror who was "not crazy about" or "didn't like" the option of a death sentence was not disqualified from the jury under *Wainwright v. Witt* if

she was "willing to set that aside and follow the law * * *." (Tr. 1498-1499). The fact that Juror No. 24 didn't like the 25-life sentencing option is irrelevant, just as it was irrelevant that she would "lean towards life" and away from the death penalty. Juror No. 24 was not an automatic vote for the death penalty and the trial court did not abuse its discretion by denying Sowell's challenge for cause.

b. Juror No. 34

Juror No. 34 indicated that he could follow the law and impose either a life or death sentence depending on the weighing of the aggravating and mitigating factors. (Tr. 1754). He twice specifically agreed to consider all three of the life sentence alternatives, under questioning from both the State and from defense. (Tr. 1749, 1761-1762). Juror No. 34 stated that he would "lean towards the death penalty," but only "if the circumstances are presented, and everything falls in-line * * *." (Tr. 1759). Although he initially indicated that he expected Sowell to provide evidence on his own behalf, after hearing additional instructions, he agreed seven times that Sowell had no burden of proof at any phase. (Tr. 1765-1767).

Sowell did not challenge Juror No. 34 on grounds relating to the death penalty. He instead raised the juror's answers regarding pretrial publicity and the burden of proof as grounds for exclusion. (Tr. 1768). The trial court properly denied Sowell's challenge for cause, finding that the State's rehabilitation of Juror No. 34 had given him additional information, and that "I think when he understood the actual way the system operates, he would agree to follow the system." (Tr. 1769). None of Juror No. 34's answers during voir dire justified removing him for cause and the trial court did not abuse its discretion by refusing to do so.

c. Juror No. 62

Sowell's objection to Juror No. 62 is based on his assertion that she was "strongly in favor" of the death penalty. Merit Brief of Appellant, p. 35-36. A juror's mere support for the death penalty, even strong support, is not sufficient to disqualify that juror for cause. "A juror's death-penalty views are cause for exclusion only if they prevent or substantially impair his or her ability to follow the law." *State v. Phillips*, 74 Ohio St.3d 72, 86, 1995-Ohio-171, 656 N.E.2d 643, citing *Morgan v. Illinois*, 504 U.S. at 728, 112 S.Ct. 2222, 119 L.Ed.2d 492; see also *Lockhart v. McCree*, 476 U.S. 162, 177, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (holding that jurors with personal predisposition favoring the death penalty do not violate the impartial jury guarantee).

Juror No. 62 was not an automatic vote for the death penalty. She stated that there were "certain cases that the death penalty should apply to. * * * [T]here are other cases I don't think it should." (Tr. 2114). She assured the trial court that she would consider all of the life alternatives. (Tr. 2102-2013). She kept to that position under questioning from defense counsel by saying that she could fairly consider the lesser sentences of 25-life and 30-life "[a]fter hearing the facts, yes." (Tr. 2118-2119). She also indicated that she would have no problem respecting the verdict of other jurors if they came to a different opinion than she did at sentencing, saying, "[t]hat's their opinion," and "I don't see where it would have anything to do with me." (Tr. 2121).

Juror No. 62 acknowledged that she had lived on Imperial Avenue, where the murders occurred, "about 30 years ago." (Tr. 2111). But aside from a familiarity with the area and with some stories in the news, Juror No. 62 said she had no opinion of Sowell's guilt, because "I don't know anything about him," and that she would not come to any

opinion, "[n]ot without evidence." (Tr. 2111-2113). That a juror lived on the same street as the defendant 30 years earlier is not a basis for removal for cause. The trial court did not abuse its discretion by denying Sowell's challenge to Juror No. 62.

d. Juror No. 28

Juror No. 28 was not an automatic vote for the death penalty. He indicated that he supported the death penalty in some extreme situations such as "war crimes," but that he had concerns about imposing a death sentence because he had heard of other cases where death row inmates had been exonerated as a result of DNA testing. (Tr. 4111-4112). Juror No. 28 explained that because of his concern over possibly executing an innocent person, "when you talking about the weighting [sic], this has to really be hundred percent." (Tr. 4112). He understood what mitigating evidence was and volunteered that the "mental health of the person who committed a crime" was something he would want to know more about before rendering a sentencing decision. (Tr. 4113). He also agreed that he would be able to participate in deliberations and would tell his fellow jurors if he came to a final decision as to the sentence. (Tr. 4121).

Although Sowell claims that Juror No. 28 "believed himself to be unable to consider sentencing options which involved parole," there is no support for this claim in the record. Merit Brief of Appellant, p. 37. Juror No. 28 agreed that he would consider all three life sentencing options. (Tr. 4093). The issue of specific sentences did not come up again during his voir dire.

Sowell again references Juror No. 28's statement that he felt fear regarding this case as a basis for exclusion. As explained above, Juror No. 28 went on to say that any fear was solely a result of his discomfort as an employee of the Veterans Administration judging and

possibly punishing a veteran with mental health problems. (Tr. 4086-4087). Juror No. 28 described the issue as, "It's just my every day job is helping, and here I am judging. So I see here kind of a conflict. That's it." (Tr. 4087). The fact that Juror No. 28 may have been more hesitant to punish Sowell was, if anything, a benefit to Sowell rather than a source of bias against him. Despite that specific concern, Juror No. 28 expressed confidence that he would have no problem sitting on Sowell's jury and deciding the case without regard to anything except the evidence presented in court. (Tr. 4090).

Sowell claims that Juror No. 28 should have been excluded for cause because he "participated in a community focus group convened in the wake of the killings to address women's safety concerns." Merit Brief of Appellant, p. 37. Juror No. 28 explained that he had attended one such event where he expressed concern for Polish women who had been victims of domestic violence but were afraid to go to the police because they were poor and did not speak English. (Tr. 4105-4106). When defense counsel followed up by asking Juror No. 28 if he believed Sowell was guilty because of this, he replied, "I don't think I have any information for yes or no." (Tr. 4108). He further stated that he agreed that Sowell was presumed innocent and had no burden of proof. (Tr. 4108-4109).

Contrary to Sowell's claim that the trial court "concluded that counsel's reasons were sufficient to justify this juror's removal for cause," what the trial court actually stated was that defense counsel's objection to Juror No. 28 on grounds of a language barrier and his revulsion to the details of the case were not sufficient to justify exclusion. Merit Brief of Appellant, p. 37. "[T]hose reasons, although they could be reasons at another phase, I don't think are sufficient at this phase, based on the death penalty qualification." (Tr. 4124). This was because the individual voir dire phase was limited to issues of hardship, pretrial

publicity, and the death penalty. (Tr. 975-976). Sowell's based his objection to Juror No. 28 on other issues and therefore should have raised those issues during general voir dire.

e. Juror No. 60

Sowell discusses, but does not really challenge, the trial court's denial of his challenge to cause regarding Juror No. 60. Sowell concedes that this juror "repeatedly professed himself to be neutral," that "[h]e also claimed to have very little knowledge about the case going in," and that he "stressed that he could approach the case with a clean slate * * *." Merit Brief of Appellant, p. 37. Sowell's challenge to Juror No. 60 during voir dire was based on Juror No. 60's statement that "I would consider all factors that are relevant presented by both sides." (Tr. 4438). Juror No. 60's answer was an entirely appropriate view of the law regarding mitigating evidence and was not a basis for exclusion.

"[A] juror need not give any weight to any particular mitigating factor although instructed to consider such factors. '[E]vidence of an offender's history, background and character' not found mitigating 'need be given little or no weight against the aggravating circumstances.'" *State v. Wilson*, 74 Ohio St.3d 381, 386-387, 1996-Ohio-103, 659 N.E.2d 292, quoting *State v. Stumpf*, 32 Ohio St.3d 95, 512 N.E.2d 598 (1987), paragraph two of the syllabus. Sowell's objection was apparently based on his belief that the law required Juror No. 60 to find that all of Sowell's evidence was indeed mitigating. There is no such requirement. A juror is always free to find that any particular evidence is entitled to no weight in mitigation. In denying Sowell's challenge for cause, the trial court found that defense counsel's questioning confused "what is relevant and what weight [is] to be given to certain factors in mitigation." (Tr. 4444). The Court stated:

> "He said several times, he would consider all factors. He doesn't take any preconceived opinions with him concerning anything. He made that

extremely clear. He would consider relevant factors. Again, that's what he would determine to be relevant, which, again, gets more into a weighing process. And that's the problem with asking specific questions about specific mitigating factors. You're trying to pre-try the case to the jury before the case is ever presented. You can't ask a juror to make a determination based on hypothetical mitigating factors or we'll be here all day with every juror. And I don't believe it's appropriate."

(Tr. 4444).

Sowell's challenge to Juror No. 60, as well as his challenges to several other jurors, is simply an attack on the trial court's decision to prohibit the parties from questioning the jurors about specific mitigating circumstances during voir dire. As explained above, that decision was correct because it prevented Sowell from trying his mitigation-phase case to jurors one-by-one during voir dire. This Court has repeatedly held for decades that such questions are improper and not protected by any constitutional right of a criminal defendant.

Juror No. 60 displayed scrupulous objectivity and intellectual appreciation for this case during his questioning. He was an ideal juror for all parties and the trial court did not abuse its discretion in passing him for cause.

Proposition of Law IV [As Stated By Appellant]: When the State Charges the Accused with an Indictment That Fails to Distinguish Between Multiple Allegations of the Same Wrongful Conduct, it Violates the Defendant's Rights to Due Process, Notice, a Unanimous Jury Verdict, and Creates the Potential for Double Jeopardy.

In his Fourth Proposition of Law, Sowell argues that he did not receive adequate notice of some of the charges against him. Sowell claims that because the indictment charged him with Rape in Counts 72 and 73 against "Jane Doe II," and in Counts 78 and 79 against "Jane Doe III," he could not be prepared to defend himself against carbon-copy indictments at trial. The record in this case demonstrates that there was an ample basis on

which to differentiate between each count. The State identified Jane Doe II and III well in advance of trial and the indictment itself listed different dates for the offenses against each victim. Moreover, each victim's testimony at trial established two separate and distinct acts of rape that were sufficient to justify Sowell's convictions on two counts of rape for each victim.

1. The State Provided Sowell Sufficient Notice of the Identity of Each of the "Jane Doe" Victims Prior to Trial.

Sowell's Fourth Proposition of Law is based entirely on the Sixth Circuit's decision in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005). In *Valentine*, the court held that the State's inclusion of 20 identical, carbon-copy charges of rape and 20 counts of felonious sexual penetration in the indictment, with no attempt to "distinguish the factual bases of these charges in the indictment, in the bill of particulars, or even at trial" deprived the defendant of his due process right to adequate notice of the charges. *Id.*, at 628. "As the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself." *Id.*, at 633.

There is no *Valentine* issue in this case because Sowell's indictment did not include any carbon-copy counts. Sowell acknowledges that Counts 72 and 73 charged Sowell with offenses that occurred on a different date, September 22, 2009, than Counts 78 and 79, which charged Sowell with offenses that occurred on October 20, 2009. Merit Brief of Appellant, p. 39. The indictment also differentiated between the victims of each count. Counts 72 and 73 charged Sowell with two counts of rape against Jane Doe II, and Counts 78 and 79 charged him with two counts of rape against Jane Doe III. Id.

The State provided further specificity by moving to amend the indictment to name each of the "Jane Doe" victims at a pretrial hearing held on May 10, 2011, more than a month before opening statements. (Tr. 878). The trial prosecutor read into the record that Jane Doe I was identified as Diane Turner, Jane Doe II as Latundra Billups, Jane Doe III as Shawn Morris, and Jane Doe IV as Gladys Wade, and provided defense counsel and the trial court with a written summary that reflected that information. (Tr. 879-880). Such a procedure is adequate to provide a defendant with actual notice of sufficiently specific facts to respond to the charges and prepare an adequate defense. *Valentine*, at 633, quoting *Parks v. Hargett*, 188 F.3d 519, 1999 WL 157431, at *3 (10th Cir.1999).

Defense counsel had no objection to the State's identification of the victims and inquired only as to whether that information had been presented to the Grand Jury. (Tr. 880). The trial court subsequently conducted an in camera review of the grand jury testimony and stated that it was "satisfied that the Grand Jury did consider the charges against the Jane Doe victims," and that "the Jane Doe victims have been identified now * * * to the Court's satisfaction." (Tr. 959). On July 15, 2011, after the State had rested its case, defense counsel noted:

> "Originally the indictment had Jane Does named, but those have been identified, so I'm assuming in the Court's instructions, that the charges with respect to Gladys Wade, Latundra Billups, and Shawn Morris will be identified in the jury instructions. * * * So I think that clears that up."

(Tr. 8968-8969). The trial court did identify each victim by name in its instructions. (Tr. 9167, 9174). Because Sowell had notice of the specific dates and identities of the victim in each of counts 72, 73, 78, and 79 before trial began, he had actual notice of sufficiently specific facts to respond to the charges against him.

Sowell's Fourth Proposition is thus that he was denied sufficient notice of the charges against him because the State indicted him on two counts of rape regarding each of two different victims on different dates. As will be explained below, the multiple counts were differentiated because they corresponded to separate conduct. Sowell had sufficient notice of these counts, was provided discovery, and had an opportunity to contest the evidence at trial. As such, his claim lacks merit and should be denied.

2. The Testimony of Both Victims Was Sufficient to Support Two Separate Convictions for Rape Against Each of Them.

Sowell also claims that the indictment was impermissible under *Valentine* because it is not clear to him that the testimony of Latundra Billups and Shawn Morris each supported a conviction on two separate counts of rape. In *Valentine*, the Sixth Circuit Court of Appeals noted that differentiation of counts could occur during trial. In this case, Sowell was provided with specificity and differentiation both before and during trial. Each victim's testimony described two distinct types of rape that Sowell committed. Latundra Billups testified that Sowell performed forced oral sex on her and then turned her over onto her stomach where he raped her vaginally from behind. (Tr. 7128). Shawn Morris testified that Sowell vaginally raped her from behind, but that his penis slipped out and he reinserted it into her anus. (Tr. 7233). There were thus two distinct sexual acts in each instance.

Sowell's rape counts were properly differentiated during trial. See *Cowherd v. Million*, 260 Fed.Appx. 781, 786-787 (6th Cir. 2008) (multiple sexual offense convictions upheld where counts were delineated with trial testimony). This Court has previously recognized that a defendant may be indicted, tried, and convicted for separate counts of

rape relating to each distinct sexual act. *State v. Nicholas*, 66 Ohio St.3d 431, 435, 613 N.E.2d 225 (1993) (holding that digital penetration of vagina, vaginal intercourse, and cunnilingus are not allied offenses of similar import). The evidence was sufficient to support Sowell's conviction for multiple rape counts related to each victim. The jury therefore had sufficient testimony before it to justify a finding of guilt on both counts related to each victim.

3. The Specificity of Names and Dates, and the Testimony of the Victims, Demonstrates That Sowell Was Not Subjected to Double Jeopardy or a Lack of Juror Unanimity.

Sowell also raises the issues of double jeopardy and juror unanimity discussed in *Valentine* as potential sources of error. Regarding the double jeopardy issue, *Valentine* recognized two problems with the indictment in that case: (1) "there was insufficient specificity in the indictment or in the trial record to enable Valentine to plead convictions or acquittals as a bar to future prosecutions," and (2) "the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense." *Valentine*, at 634–635.

Sowell cannot claim either double jeopardy issue here. The record demonstrates that the jury found Sowell guilty of a total of four rape counts, stemming from two distinct sexual acts committed against both Latundra Billups and Shawn Morris. The indictment was specific in dates, in names, and the evidence was sufficient to sustain two different convictions for rape. Sowell was not punished multiple times based on evidence of a single instance of rape. Nor is there any chance that Sowell was subject to double jeopardy. The

charges against Sowell were more exact and more delineated than were the charges in *Valentine*. Therefore, the indictment and trial transcripts taken together would limit any prosecution against Sowell in the future for allegations matching those made in his previous trial.

Finally, Sowell argues that it is impossible to determine whether the jury unanimously believed him to be guilty of each offense of rape because the four rape charges were identical. As demonstrated above, the indictment differentiated each count by date, by victim, and was supported by testimony of two distinct sexual acts for each victim. Because double jeopardy is not a concern with respect to the four counts of rape, Sowell's claim should be overruled.

4. *Valentine* is Not Binding On This Court and Should Not Be Adopted As Ohio Law.

Sowell's reliance on *Valentine* as a basis for reversal is misplaced for several reasons. First, "*Valentine* is not binding on Ohio courts." *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177, ¶ 8, fn. 2. This Court has previously held that "we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court. We will, however, accord those decisions some persuasive weight." *State v. Burnett*, 93 Ohio St.3d 419, 424, 2001-Ohio-1581, 755 N.E.2d 857 (2001).

Second, the Valentine opinion was an improper overextension of *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). The *Russell* court-which ultimately rejected the defendant's double jeopardy argument-was based on precedent dating back to the 1800's which stated that while it is generally sufficient to charge an offense using a statutory description, the accused must also be apprised of the nature of the accusations against him and "plead the judgment as a bar to any subsequent prosecution

for the same offense." *U.S. v. Simmons* (1877), 96 U.S. 360, 362; see also *Bartell v. United States* (1913), 227 U.S. 427 (and that, after judgment, the defendant may be able to plead the record and judgment in bar of further prosecution for the same offense).

Applying *Russell*, the Sixth Circuit found that Valentine's indictment also failed to protect him against double jeopardy. "If Valentine had been acquitted of these 40 charges, it is unclear what limitations would have been imposed on his re-indictment." *Valentine*, 395 F.3d at 635. The Sixth Circuit also found that there was a chance that the charges may have resulted in double jeopardy in Valentine's case. The *Valentine* court's same-case double jeopardy analysis is an overly broad extension of *Russell's* last requirement. *Russell* clearly contemplated the double jeopardy analysis to apply if the defendant is re-indicted or retried for the same offense after acquittal or conviction. *Russell* does not apply in situations where a defendant faces multiple violations of the same statute within a single case. See *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177 at fn.2 (it seems that double jeopardy problems should be cured if they arise in the future, not based upon their potential to arise).

Third, at least one federal court has found that "the United States Supreme Court has invalidated the reasoning behind one of the major grounds for the *Valentine* decision * * *." *Lawwill v. Pineda*, N.D.Ohio. No. 1:08 CV 2840, 2011 WL 1882456, at *5 (May 17, 2011), citing *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). In *Renico*, the Supreme Court held that federal appellate court decisions cannot be considered "clearly established" federal law under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *Lawwill*, at *2. The Sixth Circuit in *Valentine* had relied upon other Circuit Court cases to hold that federal law "clearly established" that the same due process requirements

regarding the sufficiency of an indictment set forth in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), should also be applied to state criminal charges. *Valentine*, at 632. Because the Supreme Court invalidated that reliance in *Renico*, the basis behind *Valentine's* holding is questionable.

Even if this Court were to find Valentine to be a correct statement of law and applicable, Sowell's claim would still lack merit as the rape counts were specified and differentiated consistent with that opinion. Therefore, Sowell's Fourth Proposition of Law is without merit and should be overruled.

Proposition of Law V [As Stated By Appellant]: When the Evidence is Overwhelming That a Capital Defendant Committed a Series of Particularly Heinous Aggravated Murders and it is Clear that the Jury Will Find a Capital Defendant Guilty of Aggravated Murder and Death Specifications, a Defendant Receives Constitutionally Ineffective Assistance of Counsel and is Denied Rights Guaranteed by the Constitutions of the United States and of Ohio when Trial Counsel Pursue a Counterproductive and Altogether Implausible Reasonable-Doubt Defense in the Trial Phase When They Had at Least a Moderately Compelling Mitigation Case.

In his Fifth Proposition of Law, Sowell argues that his trial counsel were constitutionally ineffective because they chose not to concede his guilt during the first phase of the trial. This decision was not deficient performance because Sowell had an absolute constitutional right to go to trial and to force the State to prove his guilt on every charge in the indictment beyond a reasonable doubt.

1. Standard of Review.

A defendant must satisfy a two-prong test to succeed on a claim of ineffective assistance. The defendant must demonstrate (1) "that counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense so serious[ly] as

to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To determine whether defense counsel was deficient under the first prong of *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). The goal of this inquiry is to determine whether the defendant received a fair trial, "not to improve the quality of legal representation" as a general matter. *Id.* at 689. In assessing the competence of counsel, every effort must be made to avoid the distorting effects of hindsight. *Id.* "[T]he end result of tactical decisions need not be positive in order for counsel to be considered effective." *State v. Awkal*, 76 Ohio St.3d 324, 337, 1996-Ohio-395, 667 N.E.2d 960 (1996).

Strickland requires courts to "[apply] a heavy measure of deference to counsel's judgments." *Strickland*, at 691. Under that standard, reviewing courts may not second-guess decisions of counsel that can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable * * *." *Strickland*, at 690. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

To establish prejudice under the second prong of *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, at 694. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, --- U.S. ---, ---, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011). A court's prejudice inquiry depends on the strength of the evidence in a given case. A verdict strongly supported by the record is less likely to have been affected by errors than one with weak record support. *Strickland*, at 696.

2. Sowell's Decision to Exercise His Constitutional Right to go to Trial was not the Result of Ineffective Assistance of Counsel.

Sowell had the absolute constitutional right to do exactly what he did in this case. Every criminal defendant has the rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself. Crim.R. 11(C)(1)(c). A defendant may give up these rights if he chooses. But there is no authority for the proposition that the defendant is ever required to give up those rights or that defense counsel is ineffective for failing to talk him into doing so. Sowell's position is essentially that his Sixth Amendment right to the effective assistance of counsel should negate every other right he had in this case, and that the exercise of those rights was a per se violation of his right to effective representation simply because the State's evidence was overwhelming. While courts must occasionally balance competing constitutional rights, there is simply no support for the idea that in order for trial counsel to be effective counsel must prevent a seemingly guilty defendant from going to trial.

Moreover, defense counsel has an affirmative duty to challenge the prosecution to prove each and every element of their case beyond a reasonable doubt. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." *U.S. v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Sowell cites *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) for the proposition that a defense attorney's decision to concede his client's guilt during the guilt phase of his trial is not necessarily ineffective assistance where the evidence of guilt is overwhelming. Merit Brief of Appellant, p. 46. The fact that such a strategy is permissible in some cases, however, does not mean that such a strategy is ever required. Nor does Sowell cite any authority that characterizes such a strategy as a requirement.

Nixon relied in part on a statement from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to hold that in certain circumstances, "avoiding execution [may be] the best and only realistic result possible." *Nixon*, at 191. But recognizing that there is only one realistic result does not mean that there is only one possible strategy to achieve that result. Moreover, the ABA Guidelines are not binding on defense counsel or on this Court. "It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." *Bobby v. Van Hook*, 558 U.S. 4, 20, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (Alito, J., concurring).

Finally, the decision to hold the State to its burden of proof at the guilt phase was a strategic one that defense counsel made after extensive investigation. It required more work on the part of defense counsel, not less. Such a decision is "virtually unchallengeable" in an ineffectiveness claim. *Strickland*, at 690. The fact that the strategy did not work and the jury found Sowell guilty and recommended the death penalty is constitutionally irrelevant to whether such a strategy was outside the wide range of reasonable professional assistance. *State v. Awkal*, 76 Ohio St.3d at 337, 1996-Ohio-395, 667 N.E.2d 960. The relevant inquiry is whether Sowell received a fair trial, rather than on the level of representation. *Strickland*, at 689.

Sowell's argument is that the process of going to trial itself and having the prosecution prove its case against him necessarily denied him a fair trial. To accept Sowell's Fifth Proposition of Law would require future capital defendants in Ohio to stand mute during in any guilt phase where the State has a strong case. This Court cannot constitutionally order defendants to give up all of their trial rights for the sake of preserving one possible trial strategy. Sowell's position has no support in caselaw or in the Constitution and he cannot demonstrate deficient performance based on the exercise of his own constitutional rights.

3. Sowell Cannot Demonstrate Prejudice Where the Properly Admissible Evidence Against Him in the Mitigation Phase Was Overwhelming.

Sowell acknowledges that it was inevitable that the jury would find him guilty of the aggravated murders and specifications. The overwhelming strength of the State's case, however, was not limited to the guilt phase. The aggravating circumstances in this case are unprecedented in Ohio because no defendant sentenced to death in this state has ever been convicted of 11 murders. The State's own review of this Court's post-1981 cases indicates

that the next highest number of victims in a case that resulted in a death sentence was 5 – less than half of the victims Sowell killed. See *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166 (defendant murdered five inmates during a prison riot who he suspected of snitching on him); *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342, 693 N.E.2d 246 (defendant murdered five people during a crime spree); *State v. Lundgren*, 73 Ohio St.3d 474, 1995-Ohio-227, 653 N.E.2d 304 (defendant executed a family of five he perceived as disloyal to his cult); *State v. Fautenberry*, 72 Ohio St.3d 435, 1995-Ohio-209, 650 N.E.2d 878 (defendant murdered five people over four states as a means to facilitate his trip across the country); *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623 (defendant set fire to an apartment building to cover up a robbery, killing five children).

Anthony Sowell – by the number of victims alone – is the worst offender in the history of Cuyahoga County and arguably of the State of Ohio. Sowell brutally murdered 11 innocent women by strangling them to death. He left their bodies lying around his house like garbage and went around his neighborhood taking down missing persons fliers that his victim's families had put up. He attacked at least five additional women, taunting them by saying, "Bitch, you can scream all you want, you're going to die," "you can be the next crack head bitch dead up in the street and nobody give a f*** about you," and "if you want to live, knock three times on the floor." (Tr. 6637, 6853). Sowell showed no remorse for his crimes and claimed that "[t]his is not typical of me" during his unsworn statement. (Tr. 11497). The State proved during the mitigation phase that he had no serious mental illness that could impair his ability to conform his conduct to the requirements of the law. (Tr. 11245-11246).

The aggravating circumstances outweighed the mitigating factors by a wider margin in this case than in any other capital case since Ohio reinstated the death penalty in 1981. The State submits that any rational trier-of-fact would have found that the aggravating circumstances were so strong as to mandate a death sentence. The burden for Sowell to demonstrate prejudice by establishing a "substantial, not just conceivable" likelihood of a life sentence under these facts is virtually insurmountable. *Harrington v. Richter*, 131 S.Ct. at 791, 178 L.Ed.2d 624.

Sowell's ineffectiveness claim fails to meet this extraordinarily high threshold because it is entirely speculative. Sowell theorizes that "what defense counsel should have done" was concede his guilt to "maintain credibility," "avoid annoying the jury," and "focus attention where it must be – on mitigation." Merit Brief of Appellant, p. 50, 46-47. There is no evidence in the record that defense counsel somehow lost credibility, annoyed the jury, or caused the jurors to lose focus on any mitigating evidence. Sowell simply assumes that these things occurred because he disagrees with the trial strategy in hindsight. "Such speculation is insufficient to establish ineffective assistance." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, at ¶ 217. It was equally plausible to assume that defense counsel may have lost credibility with the jury by failing to defend their client against the State's charges. "Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision." *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir.2002).

Additionally, the type of prejudice that Sowell identifies never occurred in this case. Sowell claims that defense counsels' decision to contest Sowell's guilt had the effect of "focus[ing] the jury's attention on the particularly macabre nature of the crimes." Merit

Brief of Appellant, p. 48-49. The State itself cured any prejudice to Sowell that may have resulted from an overemphasis on the guilt phase evidence against him. During the State's closing argument in the mitigation phase, the trial prosecutor explicitly discouraged the jury from looking at the evidence Sowell claims prejudiced the jury's sentencing:

> "It is the aggravating circumstances that have brought you to this point in the case. If you need to remind yourselves what brought you to this point in the case, all you've got to do is look in this box, the box containing the crime scene photographs, the autopsy protocols. I'm not going to put up any images anymore on the TV, any more graphic images. I'm not going to subject you to any more of that. But if you need to remind yourself how we got here, feel free to look in that box. I don't think that will be necessary."

(Tr. 11495). The trial prosecutor's careful stewardship of the State's evidence in this case encouraged the jury only to look at the aggravating circumstances and to put the gruesome nature of Sowell's crimes aside during their deliberations. The record simply does not support Sowell's characterization of the State's case: "They want you to see pictures. They want you to be horrified." Merit Brief of Appellant, p. 51.

Even if the State chose not to take such a cautious and respectful approach, however, Ohio law would have permitted the re-introduction during the mitigation phase of all of the evidence Sowell claims defense counsel should have avoided. R.C. 2929.03(D)(1), the statute allowing for the imposition of the death penalty in Ohio, provides in part:

> "When death may be imposed as a penalty * * * [t]he court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing * * *."

Ohio law thus permitted the jury to consider any evidence from the guilt phase relevant to the aggravating circumstances of the felony-murder kidnapping and the course-of-conduct specifications in this case.

This Court has interpreted R.C. 2929.03(D) to permit the admission of all or nearly all guilt-phase evidence in the mitigation phase of a capital trial. "R.C. 2929.03(D)(1) 'permit[s] repetition of much or all that occurred during the guilt stage.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, at ¶ 121, citing *State v. Fears*, 86 Ohio St.3d 329, 345-346, 1999-Ohio-111, 715 N.E.2d 136, quoting *State v. DePew*, 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542 (1988) ("the prosecutor, at the penalty stage of a capital proceeding, may introduce, '* * * any evidence raised at trial that is relevant to the aggravating circumstances the offenders was found guilty of committing"). See also *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶ 154 ("Most guilt-phase evidence is relevant to the penalty phase"). This included everything that Sowell now claims defense counsel should have belittled as "that so-called evidence:" the crime scene photographs showing the ligatures on the bodies, the testimony of Sowell's surviving victims establishing his intent to systematically lure in, torture, and murder women with drug problems, and the testimony of the family members of each murder victim establishing the dates they went missing and their common characteristics. Merit Brief of Appellant, p. 51. All of that evidence was relevant to establish the aggravating circumstances attached to each of the 11 murder victims.

If the State had chosen to do so, it could have introduced all of this evidence during mitigation regardless of whether defense counsel had conceded Sowell's guilt or not. The State chose a restrained approach because it knew how compelling its case was. Defense

counsel's strategy did not result in any prejudice to Sowell because the properly admissible evidence against him was more than sufficient to make this Court confident in his death sentence. Sowell's Fifth Proposition of Law is without merit and should be overruled.

Proposition of Law VI [As Stated By Appellant]: The Admission of Victim Impact Evidence at Mr. Sowell's Trial Deprived Him of Due Process and a Fair Trial as Guaranteed Under the State and Federal Constitutions.

In Sowell's Sixth Proposition of Law, he argues that the trial court erred by permitting various family members of the 11 murder victims to testify as to certain character traits of each victim and the circumstances surrounding their disappearance. Sowell does not identify what specific evidence he objects to and therefore cannot establish that the admission of any testimony was an abuse of the trial court's discretion. More importantly, all of this evidence was admissible for several proper purposes. The testimony established commonalities between each of the victims in their pattern of drug abuse, the fact that they frequented Sowell's neighborhood, when they went missing, and how investigators identified their bodies. All of these issues were relevant and necessary to proving the State's case at trial.

1. Standard of Review.

A trial court has broad discretion in admission and exclusion of evidence. A trial court's decision to admit or exclude evidence will not be reversed unless there has been a clear and prejudicial abuse of discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

2. Victim-Impact Evidence That Is Necessary to Depict the Circumstances Surrounding the Offense Is Admissible During Both the Guilt and Penalty Phases of a Capital Trial.

The admission of victim-impact evidence in a capital trial does not violate the Constitution. *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Properly circumscribed victim-impact evidence is admissible in both the guilt and the penalty phases of a capital trial. "[E]vidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during both the guilt and the sentencing phases." *State v. Fautenberry*, 72 Ohio St.3d at 440, 1995-Ohio-209, 650 N.E.2d 878. This Court has held that victim-impact evidence is admissible as long as it relates to either (1) the circumstances of the murder, (2) the existence of the statutory aggravating circumstances that permit the death penalty, or (3) the nature and circumstances of the statutory aggravating circumstances, if the evidence is introduced to attempt to refute or rebut the mitigating evidence offered. *State v. White*, 85 Ohio St.3d 433, 442-446, 1999-Ohio-281, 709 N.E.2d 140. There is thus no requirement that any victim-impact evidence be probative only as to one or more specific elements of the offense itself.

3. Sowell Cannot Demonstrate Error Where He Has Failed to Identify Any Objectionable Testimony in the Record.

Sowell claims that 21 witnesses provided victim-impact testimony during the guilt phase of his trial. He fails to cite to any examples of such testimony in the record or even to name these witnesses in his merit brief. Without specific citations to relevant portions in the record, this Court cannot adequately determine whether any such testimony was unduly prejudicial. This is a fact-intensive inquiry that depends on the reading of each individual victim's testimony. "This court has permitted victim-impact testimony in limited

situations in capital cases when the testimony is not overly emotional or directed to the penalty to be imposed." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, at ¶ 237. Without knowing what testimony Sowell believes was inappropriate, this Court cannot determine whether the trial court abused its discretion because of the nature of the testimony or even whether Sowell waived all but plain error by failing to object. Sowell must to demonstrate more than simply that some witnesses discussed the victims during the guilt phase. Mere "mention of the victims' personal situations and their relatives did not violate the Constitution." *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991).

"An appellate court is not required to comb through the record on appeal to search for error when appellants have failed to specify what factual issues allegedly remain for trial." *Tonti v. East Bank Condominiums, LLC,* 10th Dist. No. 07AP-388, 2007-Ohio-6779, at ¶ 30. See also App.R. 12(A) ("The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based"); App.R. 16(A) ("The appellant shall include in its brief * * * (3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected"). This Court should not find error where Sowell has not identified any. Sowell's attempt to ask this Court to take him at his word that such error occurred should be denied without further inquiry.

4. The Testimony of the Victims' Family Members Was Relevant to a Number of Proper Purposes at Trial.

Sowell's contention that the testimony of these witnesses "had no actual relevance to the questions of Mr. Sowell's guilt" is inaccurate. Merit Brief of Appellant, p. 54. A central aspect of the State's case was its contention that Sowell had deliberately sought out

a certain kind of victim, those with "common characteristics * * * African-American, struggling with drug abuse issues," who were "walking the neighborhood" near Sowell's house on Imperial Avenue. (Tr. 5942, 5935). The testimony of the murder victims' family members was therefore relevant to serve four separate and legitimate purposes at trial.

First, the testimony established that each of the 11 murder victims had struggled with drug abuse. This supported the State's characterization during closing statements that Sowell had "lured 11 women over to his house under the guise of using drugs." (Tr. 11528). Evidence that all of the victims were drug users also supported the State's theory of Sowell's motive to take revenge on black women with drug problems who reminded him of his ex-girlfriend Lori Frazier. That motive was likewise relevant to rebut Sowell's mitigation claims about his mental health and to demonstrate that his behavior was an example of "serial murder in the context of sexual sadism," motivated by an intense anger towards certain kinds of women. (Tr. 11385, 11391).

Second, the testimony was necessary to establish that each woman walked the streets around Sowell's home on Imperial Avenue. Proving a common nexus of location between every victim bolstered the State's case that Sowell had sought out women in his neighborhood. It explained in part how he was able to get each woman into his house without being noticed. Testimony that each victim walked the streets in support of their drug habits and would frequently go missing for days at a time was also intended to clarify in the juror's minds why family members did not report the victims missing sooner.

Third, the testimony of the victims' family members established when each victim disappeared. Such testimony was necessary in this case because the bodies were too badly decomposed for the forensic experts to provide a specific date of death for any of the

victims. The State also had to establish the date each victim went missing to prove that her death occurred during the same timeframe as the other victims, and that each murder occurred during Sowell's killing spree between when Lori Frazier finally left him in 2007 and his arrest in 2009.

Fourth and finally, many of the family members who testified had gone to the coroner's office to provide DNA for comparison to the bodies investigators had found in Sowell's home. (Tr. 5951). Their testimony was therefore important to establish how the State was able to identify each murder victim. This was a crucial step in the investigation, particularly where Sowell heavily contested during the guilt phase the veracity of the State's forensic investigation. See Merit Brief of Appellant, Fifth Proposition of Law.

All of this evidence therefore served multiple proper purposes at trial. The fact that some evidence necessary to prove the circumstances of the offenses might also have had an emotional impact on jurors does not violate any of Sowell's constitutional rights. "Evidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, at ¶ 98. See also *State v. Fautenberry*, 72 Ohio St.3d at 440, 1995-Ohio-209, 650 N.E.2d 878 ("[E]vidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible * * *"). Every witness who testified was necessary to establish an important aspect of Sowell's serial murder spree. That the testimony may have also touched on the effect of the murders does not preclude its admissibility. "The victims cannot be separated from the crime." *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212 (1993).

5. Sowell Cannot Demonstrate Prejudice From the Admission of Any Victim-Impact Testimony Where the Aggravating Circumstances Were Overwhelming and Sowell Fails to Identify Which Statements He Believes Were Prejudicial.

Finally, even in the event this Court would find any error in the admission of any of this evidence, the erroneous admission of victim-impact evidence does not necessarily constitute reversible error. *Fautenberry*, at 439. The defendant must demonstrate that the trier-of-fact "was influenced by or considered the victim impact evidence in arriving at its sentencing decision." *Id.* To show such prejudice, Sowell must demonstrate that there was a reasonable probability that the outcome of his trial would have been different but for the jury's consideration of any impermissible victim impact evidence. *State v. Reynolds*, 80 Ohio St.3d 670, 679, 687 N.E.2d 1358 (1998).

As demonstrated above, the State's case against Sowell was overwhelming at every phase of the trial. Sowell points to no specific citations in the record that would support a finding that the jury was somehow biased as a result of the admission of any particular testimony. He makes no argument that the outcome of his trial could realistically have been different but for such testimony. Such a claim would also belie Sowell's assertion that "[t]he jury, any jury, would find Sowell guilty of the 22 counts of aggravated murder." Merit Brief of Appellant, p. 43-44. This Court has no means by which to weigh a generalized assertion of prejudice to Sowell against the strength of the aggravating circumstances. Sowell therefore cannot demonstrate a substantial probability that absent such testimony he would have received a life sentence. *Harrington v. Richter*, 131 S.Ct. at 791, 178 L.Ed.2d 624. Sowell's Sixth Proposition of Law is without merit and should be overruled.

Proposition of Law VII [As Stated By Appellant]: A Death Sentence is Inappropriate and Must be Vacated When it Serves No Necessary Function, When the Defendant has Indicated Some Willingness to Accept

Responsibility for His Actions, and When There is Substantial (Even If Disputed) Mitigation Evidence.

In his Seventh Proposition of Law, Sowell invokes this Court's obligation under R.C. 2929.05(A) to independently review whether a sentence of death is appropriate in every direct appeal. Sowell emphasizes his ability to adapt well to prison, his military service, and aspects of his childhood as mitigating factors deserving of special consideration. A close examination of the record in this case reveals that all of the mitigating factors Sowell has presented at trial and to this Court are severely compromised and should be given little or no weight under this Court's precedents. The State's aggravating circumstances, on the other hand, are virtually uncontested. Their unprecedented strength in Ohio easily outweighs the mitigating factors beyond a reasonable doubt and mandates a sentence of death in this case.

1. The Aggravating Circumstances Are Entitled to Greater Weight in This Case Than in Any Death Sentence This Court Has Previously Considered.

The State's evidence established at trial that Sowell murdered 11 innocent women and attempted to murder three other women as part of a course of conduct involving the purposeful attempt to kill two or more people under R.C. 2929.04(A)(5). A course-of-conduct specification involving multiple killings "is a grave aggravating circumstance." *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, at ¶ 144. It carries "great weight with respect to each" murder. *State v. Keene*, 81 Ohio St.3d at 671, 1998-Ohio-342, 693 N.E.2d 246.

The evidence also established that Sowell murdered 10 of his 11 victims while committing or attempting to commit kidnapping under R.C. 2929.04(A)(7). The kidnappings in this case should receive additional weight beyond that normally given to

felony-murder specifications because the evidence indicates a prolonged kidnapping and torture of each victim. Sowell appears to have bound and gagged each woman so that he could rape them before strangling them to death. These were especially heinous killings and this Court should weigh the facts of each murder accordingly.

Sowell does not contest the strength of any of the aggravating circumstances in this case. Against these aggravating factors, this Court must weigh the mitigating factors under R.C. 2929.04(B). Almost all of these factors are inapplicable in this case. The mitigating evidence that Sowell does present is insufficient to approach the strength of the aggravating factors in this case.

2. The Statutory Mitigating Factors in R.C. 2929.04(B)(1), (2), (4), (5), and (6) Are All Plainly Inapplicable to This Case.

R.C. 2929.04(B)(1) instructs this Court to consider whether the victims induced or facilitated the offense in some way. The victims in this case were innocent and unarmed women with drug problems who Sowell lured into his home so that he could murder them as a means by which to punish black women with drug problems. Sowell committed a prolonged kidnapping of each victim by binding her hands or feet and gagging her mouth. These women did not induce or facilitate their own murders in any way.

R.C. 2929.04(B)(2) states that this Court should determine whether it is unlikely that Sowell would have committed the offenses but for the fact that he was under duress, coercion, or strong provocation at the time. Sowell committed these murders over a period of more than two years. He strangled each woman to death in his own home when no one else was present. There was no testimony that Sowell was under any form of duress, coercion, or strong provocation.

R.C. 2929.04(B)(4) instructs this Court to consider the youth of the offender as a mitigating circumstance. Anthony Sowell was 47 years old when he killed his first victim in 2007 and 51 years old at the time the trial court sentenced him to death in 2011. (Tr. 10955). His age is not a mitigating factor in this case.

R.C. 2929.04(B)(5) provides that a defendant's lack of a significant criminal history is a mitigating factor. Sowell has a significant and violent criminal history. In 1989, he kidnapped and raped a pregnant woman at his home in East Cleveland. Sowell lured the woman into his bedroom, slammed the door behind her, pushed her down on the bed and began to choke her. (Tr. 10783). He told her, "You can scream all you want. Nobody is home." (Tr. 10783). He raped her three times – twice vaginally and once anally. (Tr. 10783). She tried to escape several times but Sowell would grab her and throw her back onto the bed. (Tr. 10784). He gagged her with a towel, tied her hands behind her back with a necktie, and tied her feet together with a belt. (Tr. 10783). Eventually, he laid down on the bed next to the still bound-and-gagged victim and went to sleep. (Tr. 10783-10784). She escaped by spitting out the gag, crawling out of a second story window, and calling for help to people on the street below. (Tr. 10785). When Sowell was arrested, he told police that the victim was a prostitute who had slept with him for money and that she was lying about the rape. (Tr. 10785). Sowell pleaded guilty and served 15 years in prison for the 1989 rape. (Tr. 11099). His serial murders began less than two years after his release from prison in 2005. Sowell's sister Tressa Garrison also admitted on re-cross examination during the mitigation phase that Sowell had been a crack cocaine dealer at the time the rape occurred. (Tr. 10523-10524).

R.C. 2929.04(B)(6) provides that if Sowell was not the principal offender, this Court should consider the degree of his participation in the killings. Sowell was the principal and only offender in this case. There was no testimony that any other person assisted him in any way in murdering the 11 women or in attacking any of the 5 surviving victims. The (B)(6) mitigating factor therefore does not apply to this case.

3. The State Proved During the Mitigation Phase That Sowell Does Not Have a Mental Disease or Defect That Inhibited His Ability to Conform His Conduct to the Law Under R.C. 2929.04(B)(3).

R.C. 2929.04(B)(3) asks this Court to consider "[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." Dr. George Woods, the defense neuro-psychiatrist, testified that Sowell did not qualify for the first prong (lacking substantial capacity to appreciate the criminality of his conduct). He did, however, make a number of diagnoses that he felt qualified for the second prong (conforming his conduct to the requirements of the law): (1) Obsessive Compulsive Disorder (OCD), severe, chronic, with sexual obsession; (2) Post Traumatic Stress Disorder (PTSD); (3) Psychosis, Not Otherwise Specified; and (4) Cognitive Disorder, Not Otherwise Specified. (Tr. 10562-10567). Dr. Woods also theorized that a heart attack Sowell suffered while shoveling snow in February 2007 resulted in a deprivation of oxygen to his brain that impaired his cognitive functioning. (Tr. 10609-10657).

The State was able to cast significant doubt on the veracity of Dr. Woods' testimony during mitigation. In rebuttal, the State called Dr. Diana Goldstein, a neuropsychologist. Dr. Goldstein found no evidence that Sowell had ever complained of any cognitive

dysfunction, no documentation of any psychiatric problems, and no evidence of any cognitive or psychiatric disorder. (Tr. 11245-11246). Dr. Goldstein noted that previous evaluations had specifically ruled out cognitive disorders or depression based on Sowell's own repeated statements that he had no problems with thinking. (Tr. 11246). On his admission to the hospital immediately following his 2007 heart attack, Sowell scored a perfect 15 out of 15 on the Glasgow coma scale test for cognitive disorders. (Tr. 11250). A CAT scan of Sowell's brain done in November 2008 revealed no abnormalities. (Tr. 11247). There was simply no evidence that Sowell had ever suffered a cognitive disorder of any kind.

The evidence also contradicted Dr. Woods' claim that Sowell's 2007 had resulted in a deprivation of oxygen to his brain. Hospital records showed that Sowell's oxygen saturation levels were at 96 percent following his heart attack. (Tr. 11250). He also exhibited no physical symptoms of oxygen deprivation such as wheezing, coughing, or blue coloration in his fingertips. (Tr. 11304-11305). Based on that evidence, Dr. Goldstein concluded that Sowell had not suffered any neurologic event that could have compromised his brain functioning following his heart attack. (Tr. 11251).

The State also called Dr. James Knoll IV, a psychiatrist, who found that Dr. Woods had failed to substantiate almost all of his major diagnoses. Dr. Knoll stated that Dr. Woods' diagnosis of "obsessive-compulsive disorder, severe, chronic, with sexual obsession" was not only unsubstantiated by the evidence, but was actually not even a real diagnosis. "I reject that diagnosis out of hand because there's simply no such diagnosis in existence in psychiatry." (Tr. 11362). Sowell repeatedly denied having any psychotic symptoms and had never been prescribed anti-psychotic medication. (Tr. 11350-11351).

Any PTSD Sowell may have had was likely a result of dissociative amnesia from his own crimes. (Tr. 11355-11356). Moreover, even if Dr. Woods had established the existence of some type of cognitive impairment as a result of Sowell's heart attack, Dr. Knoll testified emphatically that there was no link between brain dysfunction and complex criminal behavior of the kind that Sowell demonstrated in his killings. (Tr. 11365). Dr. Woods thus failed to provide a diagnosis that could explain Sowell's behavior or establish that any cognitive impairment inhibited his ability to conform his conduct to the law.

Dr. Knoll also testified that Dr. Woods had failed to rule out the possibility that Sowell might be malingering during his examination. Sowell's claims of hearing a voice made Dr. Knoll especially skeptical of the possibility he might be malingering. People who hear voices usually hear them in the context of a "fixed false belief," for example that another person was "an FBI agent trying to kill them * * *." (Tr. 11357). Sowell had claimed only to hear one voice and had not associated it with any delusion at all. That type of reporting, Dr. Knoll stated, was highly indicative of malingering. (Tr. 11357). But despite the obligation of any psychiatrist to rule out malingering before making a diagnosis, Dr. Woods had made no effort to verify anything that Sowell told him. He simply took all of Sowell's self-reporting at face value. (Tr. 11358-11359). This is was a "critical error" in light of Dr. Woods' own testimony that he had found that he could not trust Sowell to report accurately "in a number of areas, actually." (Tr. 11359, 10740).

Dr. Knoll found that Sowell's pattern of luring women into his house to bind, rape, and kill them, and then disposing of the bodies in plastic and in shallow graves, demonstrated "a pattern that strongly suggests very deliberate, purposeful planful actions, as opposed to loss of volitional control or irresistible impulse." (Tr. 11380, 11380-11385).

Sowell's behavior was an example of "serial murder in the context of sexual sadism," motivated by an intense anger towards women. (Tr. 11385, 11391). In Dr. Woods' report, however, "there wasn't really any consideration of this behavioral evidence that we just discussed and went over. It's just not to be found in the report." (Tr. 11385).

This was not an instance in which the experts simply agreed to disagree. Dr. Woods had attempted to draw a series of conclusions that were unreliable and erroneous. Both Drs. Goldstein and Knoll were able to explain specifically how Dr. Woods had erred and why the evidence contradicted his findings. The State also provided the jury with an explanation as to why Dr. Woods' findings were an outlier when it began its cross-examination of him by running through a list of anti-death penalty publications and groups with which Dr. Woods was associated. (Tr. 10664-10668). Dr. Woods' consistent advocacy against the death penalty undermined his objectivity in this case, just as it had in other cases in the past.[5] The jury believed Drs. Goldstein and Knoll over Dr. Woods. This Court should do the same and conclude that Sowell has no mental disease or defect that inhibited his ability to conform his conduct to the requirements of the law.

4. The Mitigating Factors Sowell Presents Under R.C. 2929.04(B)(7) Should Receive Little or No Weight in Mitigation.

Sowell called 24 witnesses in mitigation. He presented a comprehensive range of mitigating evidence under the (B)(7) statutory catchall provision. This evidence encompassed virtually every conceivable mitigation defense available to him under the

[5] Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals criticized Dr. Woods by name in a death penalty case: "The reasons for dropping Dr. Woods, who maintains a cottage specialty in diagnosing criminal defendants as psychotic, are obvious. None of the other experts to examine Pinholster on behalf of either side thought much of his diagnosis." *Pinholster v. Ayers*, 590 F.3d 651, 686, fn. 1 (9th Cir.2009) (Kozinski, C.J., dissenting), *rev'd, Cullen v. Pinholster*, --- U.S. ---, ---, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2010).

facts. The trial court noted in its sentencing entry that Sowell presented evidence of "the love and support of defendant's family; his academic record; his work history; his ability to function as a productive person in a structured environment such as prison; and his remorse for his crimes." (Tr. 11622). The trial court carefully weighed each factor prior to sentencing. (Tr. 11622-11631). The jury and the trial court found that the aggravating circumstances outweighed all of these factors beyond a reasonable doubt. The State submits that this Court should come to the same conclusion in its independent reweighing.

a. Sowell's Claim That the State Does Not Need to Kill Him Is Irrelevant to This Court's Reweighing.

Sowell first argues that "there is no need to kill Anthony Sowell." Merit Brief of Appellant, p. 57. This is not the standard by which this Court reviews the appropriateness of a death sentence. The Supreme Court of the United States has identified retribution and deterrence as the death penalty's two principal social purposes. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is always simply a question of sentence is appropriate under the circumstances. "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.*, at 184.

This is the penultimate death penalty case. The defendant committed a series of murders of innocent women. He deliberately sought out victims by their gender, their skin color, and their lifestyles to punish them in what he believed to be acts of vigilante justice. He then systematically stored and concealed the bodies in and around his house to escape detection, doing so successfully for over two years before his arrest. Sowell also admitted

during his police interview that had he remained free, he would have continued to conceal the bodies in his house:

> DET. GRIFFIN: How long did you plan on staying there? If we hadn't gone in and discovered those bodies, you would have been living there with those bodies until they skeletons, wouldn't you?
>
> MR. SOWELL: Yeah –

(Interview Transcript, at p. 696).

The State of Ohio's interest in retribution has never been stronger than it is in this case. The trial prosecutor explicitly invoked this as a reason to recommend death in his closing argument:

> "When the smoke clears and the dust settles and all the aggravating circumstances are weighed against the mitigating factors in this case, the reason why Anthony Sowell should receive the sentence of the imposition of death is quite simple. He deserves it."

(Tr. 11508). Sowell's death sentence and eventual execution will also serve the State's interest in deterring future crime. "[T]here are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent." *Gregg*, at 185. Both constitutionally-recognized purposes of the death penalty create a substantial interest on the part of the State in enforcing Sowell's lawfully-imposed death sentence in this case.

b. Sowell's Ability to Adapt Well to Prison is Entitled to Little To No Weight in Mitigation.

In support of this claim, Sowell argues that his death sentence is unnecessary because Sowell has shown that he can be a good inmate in prison. Merit Brief of Appellant, p. 57-61. Evidence that a defendant adjusts well to prison is entitled only to "slight mitigating weight * * *." *State v. Smith*, 80 Ohio St.3d 89, 121, 1997-Ohio-355, 684 N.E.2d

668. This Court should accord that evidence especially little weight in this case. The reason Sowell is not a problem in prison is because his crimes were motivated by an intense hatred for women. (Tr. 11391-11393). Sowell's expert neuro-psychiatrist, Dr. George Woods, agreed under cross-examination that Sowell likely functioned well in prison because he came into contact with few, if any, women during his 15-year prison sentence. (Tr. 10760-10762). Dr. Woods also admitted that all of Sowell's violent behavior throughout his life was directed exclusively towards women and that there were no recorded instances of him ever acting out against another male inmate. (Tr. 10763-10764).

Under the facts of this case, prison was simply an insufficient punishment for Sowell's offenses. This is particularly true where the jury had the benefit of hindsight and knew that Sowell could not be rehabilitated or changed by mere incarceration. The trial court stated in sentencing that Sowell had actually gotten worse after serving 15 years, committing all of his murders after his release. (Tr. 11625). There was therefore no possible benefit to a prison sentence in this case. Sowell's willingness to return to an environment of his choice should be given little or no weight by this Court.

c. Sowell's Military Service is Entitled To Little Weight in Mitigation and Arguably Strengthens Several Aspects of the Case Against Him.

Sowell also points to his seven years of service in the Marine Corps. as a mitigating factor. Merit Brief of Appellant, p. 62-64. The State agrees that Sowell's service as an electrician in the Marine Corps. is still entitled to "some weight" in mitigation. *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, at ¶ 160. The trial court explicitly noted that it afforded Sowell's military service such weight in at sentencing. (Tr. 11625). This factor should receive diminished weight for three reasons.

First, there is evidence in the record that Sowell was abusing alcohol during his time in the Marine Corps. Sowell's military records stated that in 1984, he was demoted after an alcohol-related behavioral incident while stationed in Okinawa, Japan. "Reduced to corporal by battalion level NJP for drunken and disorderly actions, provoking actions toward MPs, and resisting apprehension while on off-base liberty with lance corporal." (Tr. 10884). The report also stated: "Above actions indicate immature character and poor leadership example. Potential limited by failure to accept responsibility for actions * * *." (Tr. 10884). This Court has previously found that evidence a defendant abused alcohol while in the military diminishes the mitigating weight of that military service. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 198, 1993-Ohio-170, 616 N.E.2d 909. In another incident, Sowell went AWOL from the Marines for an extended period of time and was initially labeled a "deserter" before his superiors reduced his punishment. (Tr. 10903-10905).

Second, Sowell's ability to function well in the Marines was consistent with the State's argument that Sowell's violent crimes were motivated by a hatred of women. Evidence at trial indicated that as of 2010, women accounted for only 7.5% of the United States Marine Corps. That number was significantly lower during the time that Sowell served from 1978-1985. (Tr. 10899-10900). The evidence of Sowell's good behavior in the Marines was therefore consistent with the testimony of Dr. James Knoll IV that Sowell's killings were "[m]ost definitely" suggestive of an intense anger towards women. (Tr. 11391-11393).

Finally, Sowell abused his military training by using specific aspects of that training to murder his victims. Sowell's military records expert, Walter Bansley III, testified in mitigation that Sowell would have learned how to use several types of choke holds in his

basic training "[t]o immobilize somebody, to kill somebody." (Tr. 10914). Shawn Morris described Sowell's attack on her by saying that "he came up behind me and put me in a military chokehold." (Tr. 7230). Gladys Wade also testified that Sowell had approached her from behind while she walked down the sidewalk on Imperial and put not mitigating her in a choke hold until she blacked out. (Tr. 6629). The mitigating effect of military service is diminished where Sowell used that training to rape and murder innocent women. This Court should therefore afford his military service with little or no weight.

d. Sowell Has Failed to Demonstrate Any Remorse for His Crime and Deserves No Weight Whatsoever For this Factor.

Sowell claims that he expressed remorse before and during his trial by offering to plead guilty in exchange for a life sentence. Merit Brief of Appellant, p. 69-73. This Court has previously held that "a defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death." *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, at ¶ 69. Sowell argues in his Eighth Proposition of Law that this Court was incorrect in *Dixon*; the State will respond to that argument under that separate proposition.

This Court does not need to rely on *Dixon*, however, to find that Sowell's purported expressions of remorse should be given no weight. Sowell freely acknowledges that it was inevitable that "[t]he jury, any jury, would find Sowell guilty of the 22 counts of aggravated murder" and that the minimum possible sentence he could have received would have kept him in prison for "quite literally, centuries in the future." Merit Brief of Appellant, p. 43-44. This Court has previously found that a defendant's offer to plead guilty deserves very little

or no weight where it is made only because the defendant knows he will be convicted regardless. See *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, at ¶ 117 ("We accord only minimal weight to Hoffner's offer to plead guilty to the charges in exchange for the prosecutor's dismissing the death penalty specifications from the indictment, as Hoffner knew that the evidence against him was overwhelming"); *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶ 106 (trial court is within its discretion by giving such an offer no weight in mitigation where defendant "was conceding little regardless of the outcome of the trial"), citing *State v. Stumpf*, 32 Ohio St.3d 95, 106, 512 N.E.2d 598 (1987) (guilty plea in the face of a hopeless trial is entitled to little weight as mitigation).

Sowell's offer to plead guilty was not an expression of genuine remorse because it was completely one-sided in his favor. Sowell intended to give up nothing in exchange for a lesser sentence. This Court should also note that in Sowell's request, he never offered to make any apology to the victim's families or even a public acceptance of guilt for his crimes. (Tr. 1192-1194). The absence of any concessions or goodwill gestures whatsoever strongly indicates that Sowell's plea offer was not an expression of genuine remorse.

Sowell attempts to portray his offer as a genuine concession because Sowell had made the offer informally to the prosecution more than a year before trial began, when "the outcome was far from certain." Merit Brief of Appellant, p. 70. This was true of the mitigation phase but not of the guilt phase. Sowell was the lone occupant of a house in which investigators had discovered 11 dead bodies. He admitted to killing all of them during his recorded interrogation. Investigators found blood, clothing, and personal belongings of the victims in his bedroom. All of the factors that Sowell points to as being

undetermined at the time he first made the offer were relevant only to mitigation. Sowell's offer to concede guilt and skip the mitigation phase on his way back to prison was therefore not a concession of anything.

The facts of Sowell's case also counsel against giving any weight to his newfound remorse. Sowell spent 15 years in prison for a vicious rape he committed in 1989. Sowell demonstrated no remorse for his crime while in prison, telling his sister Tressa Garrison that the police had told the victim to set him up. (Tr. 10524-10525). Sowell had also written on a fill-in-the-blank questionnaire during his intake at the Lorain Correctional Institution that "most women just tell lies." (Tr. 10733). Dr. Woods, the defense neuro-psychiatrist, admitted that Sowell had lied continually about the 1989 rape and was "definitely in denial about that." (Tr. 10775).

Sowell was not rehabilitated in his 15-year prison sentence. After Lori Frazier left him in 2007, he sought out women who reminded him of Frazier and began a series of serial killings that lasted more than two years. He referred to the breakup with Frazier as "when I started gearing things up." (Interview Transcript at 56). He said that he had chosen these victims because "[t]hey reminded me of my girl." (Interview Transcript at 270). He then bound, gagged and raped these women in prolonged instances of torture. He most likely murdered each woman by strangling her to death; a process that the coroner testified requires "[a]nywhere from three to five minutes" of constant pressure on a person's neck. (Tr. 8166-8167). The surviving victims testified to horror stories of rape and torture in which Sowell would taunt them with statements such as, "I hate you bitches. Look at you, you've got a husband at home and you out here in the streets * * * That's why I

hate bitches," and "if I didn't do what he said to do he was going to throw me in the closet and forget about me." (Tr. 7232, 6533).

All of this required a substantial period of time and allowed Sowell unlimited opportunities to either confess or at least to stop what he was doing. Sowell refused to stop and, if anything, accelerated his rate of killing. Sowell had roughly two-and-a-half years after he first murdered Crystal Dozier in 2007 to think about what he had done and to voluntarily come forward to the police. He instead spent those years continuing to bring more women into his house to be killed, culminating in at least five murders in the first ten months of 2009 alone. Sowell showed no remorse at any point during this time until he was under arrest. Even after learning that police were in his house and had discovered some of the bodies, the trial court noted that Sowell "avoided the scene, was preparing to leave the area and gave police a false name when arrested." (Tr. 11628).

"Retrospective remorse * * * is entitled to little weight. Indeed, we are inclined to doubt the sincerity of appellant's remorse, which slumbered while he murdered five people in succession, and awoke only after his arrest." *State v. Keene*, 81 Ohio St.3d at 671, 1998-Ohio-342, 693 N.E.2d 246. The only thing that changed from that time period to when Sowell offered to plead guilty was that he was facing the death penalty.

Sowell also says that he demonstrated remorse in his nearly 12-hour interview with police after his arrest. Merit Brief of Appellant, p. 70-72. Dr. James Knoll IV, the State's forensic psychiatrist, testified during mitigation that Sowell had displayed a number of signs of malingering during his interview where he was less than forthcoming about his crimes:

> "[T]he thing that struck me about the video with the detectives was that Mr. Sowell demonstrated a rather classic sign of malingering known in the

> literature as double denial of responsibility. That is, when asked about the offenses he gives two simultaneous alleged excuses for the offenses. First he says, I don't remember doing it, or I could have done it, but it was in a dream. And then he also says: I heard a voice telling me, You know what to do. * * * in some ways it was more than even a double denial. It was almost a quadruple denial, in that he goes on to say, well, I may have committed this because of my girlfriend, because I was angry at my girlfriend. And then at another point he says, I may have committed these murders because these women conned me. In other words, it's their fault. They conned me. And that's why I did what I did."

(Tr. 11388-11389). Sowell deserves no benefit in mitigation for his deliberate and repeated attempts to confuse investigators. "[C]laims of blacking out and hearing voices * * * can be interpreted as attempts to avoid responsibility." *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, at ¶ 99.

Sowell also displayed a complete lack of remorse during his trial. The trial court gave no weight to Sowell's claim of remorse, noting in its sentencing opinion that Sowell "never changed his expression when photograph after photograph of the crime scene and the decomposed bodies of 11 women" were shown on television screens in the courtroom. (Tr. 11629). When a witness testified as to something in Sowell's personal life, however, Sowell's "affect changed and he showed emotion, both happiness, laughter and sadness, tears, during their testimony." (Tr. 11629).

Sowell's unsworn statement was similarly self-obsessed. Sowell's defense counsel led him through an extensive unsworn statement that covered 33 pages of transcript. (Tr. 11146-11179). Sowell spent almost the entirety of that time discussing his own life. He spoke only the following sentences about this case or about the women he killed:

> "Well, the only thing I want to say is that I'm sorry. I know that might not sound like much. But I truly am sorry from the bottom of my heart. This is not typical of me. I don't know what happened. I can't explain it. But I know it's not a lot, but that's all I can give you."

(Tr. 11179). Sowell's forced recitations of a few sentences during his unsworn statement and his ploy to receive the minimum sentence in this case are not demonstrations of remorse. This Court should accord this factor no weight whatsoever.

e. Sowell's Background is Entitled to Minimal Mitigating Weight Where He Had Loving Relationships With All of His Family Members and There is No Evidence to Substantiate His Claims That He Was a Victim of Abuse.

Sowell also offers evidence related to his childhood upbringing as relevant under the (B)(7) catchall provision. This evidence is entitled to little weight in mitigation because Sowell himself has stated he had positive and loving relationships with both of his parents. On a questionnaire that Sowell filled out on his admission to the Lorain Correctional Facility in 1990 to serve his 15-year sentence for rape, Sowell wrote in response to a question about his father that "my father is the best" (Tr. 10732). He described his mother as his "best friend," and that "[w]hen I was a child, my mother gave me all a child could want." (Tr. 10728, 10729).

There is no evidence that Sowell was ever a victim of any kind of abuse except for his own self-reporting after his arrest. His own mitigation phase witnesses testified that such abuse had likely never occurred at all. Sowell's grade school teacher, Catherine Whelan, testified that Sowell did not behave like a child who had been abused and that she had never seen any marks on his body. (Tr. 9707-9708). His niece Leona Davis, who lived with Sowell in their childhood home on Page Avenue, testified that she never saw anyone abuse Sowell in the house. (Tr. 9832). While Davis testified that Sowell's mother was physically abusive, she was clear that this abuse was confined to Davis and her six siblings. (Tr. 9755). Sowell's mother had informally adopted the Davis children after her sister

Patricia Davis died at a young age. (Tr. 9845-9846). Sowell stood by and watched as his mother and grandmother abused the Davis children. (Tr. 9758, 11614.)

Sowell's sister Tressa Garrison testified that their grandmother would hit the Davis children, but never Sowell or Tressa because she knew Sowell's mother "would have a fit if she would hit us, me and Anthony." (Tr. 10475). Sowell's nephew Jesse Hatcher said that he had never seen or even heard of anyone abusing Sowell himself. (Tr. 9919). Sowell had also checked "no" on his intake screening questionnaire at LCI under "history of sexual abuse." (Tr. 10722).

Testimony during mitigation showed that Sowell actually inflicted abuse in the home by repeatedly raping his niece Leona beginning when he was 11 or 12 years old and she was 10. (Tr. 9784-9785). The only evidence that Sowell was ever personally a victim of abuse was Sowell's own statements. (Tr. 10583, Sentencing Entry, at ¶ 33-35). That self-reporting is unreliable in light of Dr. Woods' admission that Sowell had been dishonest during his evaluation "in a number of areas, actually." (Tr. 10740).

The trial court correctly assigned evidence relating to Sowell's background "minimal" weight. (Tr. 11619). Although Sowell grew up in a "somewhat dysfunctional background," he nevertheless had loving relationships with both of his parents and his sister Tressa. (Tr. 11618). He displayed appropriate emotions towards them before and during the trial and was able to succeed to an extent in the Marines. (Tr. 11618-11619). Moreover, "a majority of the children subjected to the same or worse environment that the defendant grew up in did not develop the same propensity towards violence * * *." (Tr. 11619). There is nothing remarkable about Sowell's background that reduces his culpability or makes his death sentence inappropriate. All of the abuse that Sowell

discusses in his merit brief happened to other people and is not mitigating evidence of his character. This factor should receive little weight from this court.

f. There is Nothing Mitigating in the Nature of Sowell's Offenses Where They Were the Product of Deliberate and Purposeful Planning.

Sowell also claims that his violence towards women "wasn't a planned and calculated thing." Merit Brief of Appellant, p. 77. The fact that Sowell attacked at least 16 women on 16 separate occasions strongly suggests otherwise. Sowell himself stated in his police interview that he deliberately sought out women who reminded him of his girlfriend Lori Frazier because he resented them for their drug use. (Interview Transcript at 285-286, 622, 795-796). The deliberate selection of a specific class of victims indicates that Sowell was motivated by rage and that he planned each attack in advance. The surviving victims who testified in Sowell's trial stated that he kept them prisoner for hours in his home while he repeatedly raped and threatened to kill them. Vanessa Gay testified that Sowell actually reflected on whether he believed she deserved to be killed as he was raping her, saying "You don't deserve what I'm going to do to you." (Tr. 6535). Gladys Wade testified that Sowell actually grabbed her outside on the street and forcibly dragged her unconscious body up to his third floor. (Tr. 6629-6630). All of Sowell's actions required time, effort, and significant thought.

If Sowell's violence was truly unplanned, there would be no pattern to it. But as Dr. Knoll testified the facts of this case – all 11 women strangled and systematically concealed, all in his house, all black females with drug problems – is "a pattern that strongly suggests very deliberate, purposeful planful actions, as opposed to loss of volitional control or irresistible impulse." (Tr. 11380-11385). Sowell did not spontaneously lose control on 16 separate occasions and this Court should reject his attempt to re-characterize his crimes as

a spur-of-the-moment decision. Not even his experts at trial attempted to make that argument.

To the extent that this Court might view Sowell's argument as his raising voluntary intoxication as a mitigating factor, voluntary intoxication is entitled to very little weight under Ohio law. See *State v. Goff*, 82 Ohio St.3d 123, 143, 694 N.E.2d 916 (1998) ("we give little weight to appellant's voluntary substance abuse"); *State v. Mitts*, 81 Ohio St.3d 223, 237, 690 N.E.2d 522 (1998) ("voluntary drunkenness is entitled to very little mitigating weight").

5. Sowell's Death Sentence is Proportionate to Other Death Sentences This Court Has Approved.

The final step in this Court's independent sentence analysis is proportionality review. "In determining if the sentence is appropriate, we consider if it is excessive or disproportionate in comparison to other cases in which the death penalty has previously been imposed." *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361, at ¶ 352.

Sowell's sentence is both appropriate and proportionate compared to other death sentences this Court has approved for course-of-conduct murders. *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶ 198 (defendant murdered five inmates during a prison riot who he suspected of snitching on him); *State v. Keene*, 81 Ohio St.3d 646, 672, 1998-Ohio-342, 693 N.E.2d 246 (defendant murdered five people during a crime spree); *State v. Lundgren*, 73 Ohio St.3d 474, 496, 1995-Ohio-227, 653 N.E.2d 304 (defendant executed a family of five he perceived as disloyal to his cult).

Sowell's death sentence is also proportionate compared to other death sentences this Court has approved for aggravated murders committed during a kidnapping. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶ 271 (defendant ordered

the murder of a prison guard inmates were holding captive during the Lucasville riot); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 405 (defendant stabbed to death an 86-year old woman he was holding captive in her apartment).

Sowell argues that prosecutors in other jurisdictions have frequently pleaded death penalty cases against serial killers down to life sentences. Merit Brief of Appellant, p. 65-69. These cases are not relevant to this Court's proportionality review. "[T]he proportionality review contemplated by R.C. 2929.05(A) should be limited to cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen*, 31 Ohio St.3d 111, 123, 509 N.E.2d 383 (1987). The cases Sowell refers to are especially improper for consideration because none of them are Ohio cases and many of them were prosecuted at the federal level. The scope of this Court's proportionality review is limited to those cases this Court has already decided. *Id.* Sowell's list of non-Ohio cases is also not an accurate representative sample because he makes no attempt to account for the many serial killers who have received the death penalty.

The State submits that the aggravating factors outweigh the mitigating factors by proof beyond a reasonable doubt in this case. Sowell's death sentence is also appropriate in light of his brutal serial killings and proportionate to other cases involving even fewer victims. This Court should affirm Sowell's death sentence in its independent reweighing because the aggravating factors in this case are unprecedented in Ohio. Sowell's Seventh Proposition of Law is without merit and should be overruled.

Proposition of Law VIII [As Stated By Appellant]: Trial Court Violates the Defendant's Right to a Reliable and Fair Sentencing Proceeding by Barring the Defense from Advising the Jury That Mercy was a Mitigating Factor and That He Offered to Plead Guilty in Exchange for a Life Without Parole Sentence.

In his Eighth Proposition of Law, Sowell argues that the trial court abused its discretion by limiting his ability to present certain types of evidence during the mitigation phase. Specifically, Sowell claims that the trial court should have permitted him to present evidence of his offer to plead guilty in exchange for a life sentence. Sowell also claims that the trial court abused its discretion by failing to instruct the jury that mercy was a mitigating factor. The trial court was correct to exclude evidence of Sowell's plea attempt because it has the authority to exclude anything that is not relevant to a mitigating factor. This Court has also repeatedly held that mercy is not a mitigating factor and that a trial court should not instruct a jury on it to avoid the risk of increased arbitrariness in sentencing. This Court has rejected both of Sowell's contentions in the past and should continue to do so.

1. Standard of Review for the Admission of Evidence.

A trial court has broad discretion in admission and exclusion of evidence. This Court will not reverse a trial court's ruling unless there has been a clear and prejudicial abuse of discretion. *State v. Hymore*, 9 Ohio St.2d at 128, 224 N.E.2d 126. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

2. The Trial Court Did Not Abuse its Discretion by Excluding Evidence of Sowell's Self-Serving Offer to Plead Guilty in the Face of a Hopeless Trial Because the Offer Was Not Relevant to Remorse.

In *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, this Court held that "a defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death." *Id.*, at ¶ 69.

Sowell now asks this Court to overturn its decision in *Dixon* because under the Supreme Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the sentencing body cannot refuse "to consider, as a matter of law, any *relevant* mitigating evidence." *Id.* at 114. Sowell claims that this means "[t]here are to be no limits placed on such [mitigating] evidence – anything can be a mitigating factor." Merit Brief of Appellant, p. 81-82.

Sowell is wrong to assume that *Eddings* makes all mitigating evidence automatically relevant. *Eddings* "does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes. The trial court retains its traditional authority 'to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'" *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir.2005), quoting *Lockett v. Ohio*, 438 U.S. 586, 604, fn. 12, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). The Supreme Court has relied on Footnote 12 of *Lockett* to hold that courts may exclude certain evidence from capital sentencing hearings as irrelevant. See *Oregon v. Guzek*, 546 U.S. 517, 523, 126 S.Ct. 1226, 163 L.E.2d 1112 (2006) (defendant has no right to present new evidence of his innocence at the sentencing hearing); *Blystone v. Pennsylvania*, 494 U.S. 299, 306-307, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (defendant has no right to jury instruction encouraging jury to weigh lack of severity of aggravating factors as a mitigating circumstance).

This Court correctly held in *Dixon* by holding that evidence of an offer to plead guilty is not relevant in mitigation. This Court has recognized that an offer to plead the case down to a life sentence is not relevant to mitigation, even when it is the prosecutor who makes the offer. *State v. Webb*, 70 Ohio St.3d 325, 336, 1994-Ohio-425, 638 N.E.2d 1023. "A plea

offer 'does not relate to the defendant's character, prior record, or to the circumstances of the offense * * *.'" *Id.*, citing *Davis v. State*, 255 Ga. 598, 614, 340 S.E.2d 869 (1986). A mere offer to plead guilty by itself has no legal consequence and is not relevant to the jury's considerations. "There could have been a multitude of reasons why the prosecutor may have offered a plea bargain." *Id.* Sowell's argument is substantially weaker than the defendant in *Webb*. There was only one reason why Sowell offered to plead guilty in exchange for a life sentence: Because he did not want to die. Sowell was able to inform the jury of his desire to avoid the death penalty throughout the mitigation phase. His plea offer therefore would have added nothing to his benefit.

Such an offer was also a dangerous, "two-edged sword" in mitigation because it would have enabled the State to put on evidence as to why it did not accept Sowell's offer. The State could have called representatives from the police department, the coroner's office, or the prosecutor's office itself to testify that this was the worst series of crimes they had ever seen. The State could have called additional victims and victim's family members who urged the State not to accept any plea deal. The State also would have moved to introduce the testimony of an additional uncharged victim who Sowell raped in April 2009 and who submitted a rape kit that later tested positive for Sowell's DNA. (Tr. 926-928). The State chose not to call her as a witness because it did not want to delay the trial after the defense attorneys requested a continuance to conduct independent testing of the rape kit. (Tr. 927). Had Sowell introduced evidence of that plea offer, it would have opened the door to additional evidence from the State that likely would have made his offer even less compelling to the jury.

Additionally, the State has already argued above that Sowell's offer to plead guilty did not show remorse as a matter of fact. Sowell did not demonstrate any willingness to make any public acceptance of guilt for his crimes and offer to apologize to any of his victim's families. For this, he insisted on the condition that the State plead his case down to a life sentence that would have demeaned the seriousness of Sowell's conduct. Sowell's offer was merely an attempt to save his own life. Permitting defendants to introduce evidence of plea negotiations never even considered by the prosecution would create an incentive for defendants to manufacture additional "mitigating" evidence that is not truly demonstrative of remorse.

The Sixth Circuit has subsequently followed this Court's lead and held that a defendant's offer to plead guilty is not relevant to mitigation. In *Owens v. Guida*, 549 F.3d 399 (6th Cir.2008), the court held that a trial court does not violate a defendant's constitutional rights by refusing to admit evidence that the defendant offered to plead guilty in exchange for a life sentence as relevant to the defendant's willingness to accept responsibility. Owens' offer to plead guilty showed no acceptance of responsibility because Owens "did not offer to plead guilty unconditionally, which she could have done. Instead, she agreed to plead guilty only if guaranteed a life sentence in return." *Id.*, at 420. It was not unreasonable to hold Owens' refusal to plead guilty unconditionally against her because such an offer "would not have been volunteering for death * * *. It simply would have accepted responsibility, and her punishment then would have been in the hands of the jury, just as it ultimately was." *Id.* That Owens offered to plead guilty only in exchange for a life sentence showed that "she was less interested in accepting responsibility and more

interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor." *Id.*

Finally, Sowell argues that this evidence was relevant in his trial because "the jury should have known that the entire process they had just endured, was exclusively driven by the State's insistence on obtaining a death sentence." Merit Brief of Appellant, p. 82. A party has no right to submit evidence to a jury merely to increase their understanding of the legal process. It is for this reason that this Court has discouraged trial courts from informing jurors that their sentencing decision is only a recommendation subject to review by the trial court. See *State v. Keith*, 79 Ohio St.3d 514, 518, 1997-Ohio-367, 684 N.E.2d 47 ("We prefer that no reference be made to the finality of the jury's sentencing decision at all"). Sowell is not permitted to put evidence in front of the jury simply because he thinks they might want to hear it, especially where that evidence is likely to confuse or to mislead the jurors. See Evid.R. 403(A).

Sowell's claim is also disingenuous. Sowell could have avoided a full jury trial by (1) waiving his right to a jury trial and proceeding in front of a three-judge panel, (2) presenting a more compelling plea offer to the State by offering to admit his guilt, to make a public apology to the families of the victims, and to not demand anything in return, (3) by declining to present mitigating evidence and accepting whatever sentence the jury recommended, or (4) by not murdering 11 women in the first place. Sowell had a right not to take most of these options and the State had a right to take him to trial on the indictment.

3. Standard of Review for Denial of a Requested Jury Instruction.

An appellate court reviews a trial court's decision to give the jury a particular set of jury instructions under an abuse of discretion standard. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). If, however, the jury instructions incorrectly state the law, then an appellate court will conduct a de novo review to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party's substantial rights. *State v. Kovacic,* 11th Dist. No.2010–L–018, 2010-Ohio-5663, at ¶ 17. Furthermore, an appellate court must review jury instructions in the context of the entire charge. *State v. Hardy*, 28 Ohio St.2d 89, 92, 276 N.E.2d 247 (1971).

4. The Trial Court Correctly Refused to Instruct the Jury That Mercy Is a Mitigating Factor Under Ohio Law.

"[M]ercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d 402, 416, 2000-Ohio-449, 721 N.E.2d 73. This is because "[m]ercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." *State v. Lorraine*, 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993). Allowing the jury to consider mercy in its sentencing deliberations would be harmful to the fairness and reliability of the death penalty system because it would increase its arbitrariness. The Supreme Court of the United States has approved a prohibition on considerations of "sympathy" at sentencing, finding that such a limitation "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *California v. Brown*, 479 U.S. 538, 543, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Such a limitation also "fosters the Eighth Amendment's 'need for reliability * * *'" and "ensures the availability of meaningful judicial review * * *." *Id.* Permitting the jury to consider mercy, by contrast, "would violate the well-established principle that the death penalty must not be

administered in an arbitrary, capricious or unpredictable manner." *Lorraine* at 417. "The arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." *Id.*

No error occurred in this case because the trial court's instructions to the jury went above and beyond what this Court has required. The trial court instructed the jury in this case that "In fairness and mercy, you must consider all of the mitigating factors presented to you." (Tr. 11479). This Court approved an identical "in fairness and mercy" instruction in *State v. Garner*, 74 Ohio St.3d at 57, 1995-Ohio-168, 656 N.E.2d 623. "Such a charge constitutes adequate instruction concerning the extension of mercy to a capital defendant." *Id.* Moreover, this Court has also held that "[t]he trial court, however, need not refer to mercy in that context * * *." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, at ¶ 93. The trial court in this case generously afforded Sowell the "in fairness and mercy" instruction even though Ohio law did not require that instruction.

The trial court also permitted Sowell's defense counsel to plead for mercy during closing statements. (Tr. 11519). This Court has likewise held that Sowell had no constitutional right to do so. *Lorraine* at 418. The trial court did not deprive Sowell of any constitutional right to present mitigating evidence in his favor. Sowell's Eighth Proposition of Law is without merit and should be overruled.

Proposition of Law IX [As Stated By Appellant]: A Court Commits Error and Violates a Defendant's Rights Under the Constitutions of the United States and of Ohio When It Refuses to Instruct a Jury in the Sentencing Phase of a Capital Trial That There is a Presumption In Favor of a Life Verdict Just as at the Trial Phase There Was a Presumption of Innocence.

In his Ninth Proposition of Law, Sowell argues that the trial court abused its discretion by refusing to instruct the jury at the mitigation phase that there is a

"presumption of life" in sentencing. The trial court's refusal to give such an instruction was correct where Sowell's request had no basis in OJI, statute, or caselaw. The trial court instructed the jury that it could only impose death if the State met its burden of proving the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt. That instruction is all that Ohio law requires and any further attempt to rephrase that requirement would have been baseless and needlessly confusing.

1. Standard of Review.

An appellate court reviews a trial court's decision to give the jury a particular set of jury instructions under an abuse of discretion standard. *State v. Wolons*, 44 Ohio St.3d at 68, 541 N.E.2d 443. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140. Furthermore, an appellate court must review jury instructions in the context of the entire charge. *State v. Hardy*, 28 Ohio St.2d 89, 92, 276 N.E.2d 247 (1971).

2. The Trial Court Properly Refused to Instruct the Jury That There Was a "Presumption of Life" Under Ohio Law.

There was no error in the trial court's penalty phase instructions. The trial court correctly instructed the jury on exactly what Ohio law requires:

> "In order for you to decide that the sentence of death shall be imposed upon Anthony Sowell, the State of Ohio must prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty are sufficient to outweigh the factors in mitigation of imposing the death sentence. The defendant does not have any burden of proof."

(Tr. 11476). This instruction tracks word-for-word 4 Ohio Jury Instructions (OJI), Section 503.011. It also follows the language of Ohio's death penalty statute, R.C. 2929.03(D)(1):

> "The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

Neither OJI nor R.C. Chapter 2929 contains the phrase "presumption of life." Nor is there any caselaw in Ohio that requires or even advocates such an instruction. Sowell provides this Court with no authority to support his argument that such an instruction is required.

Courts in other jurisdictions that have considered a defendant's request for a "presumption of life" instruction have been unanimous in rejecting such a requirement. See *People v. Dement*, 53 Cal.4th 1, 56, 264 P.3d 292 (2011) ("The trial court need not instruct that there is a presumption of life"); *Brown v. State*, 890 So.2d 901, 920 (Miss.2004) ("we have repeatedly said that we reject the 'proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment'"); *Smallwood v. Gibson*, 191 F.3d 1257, 1271 (10th Cir.1999) ("petitioner has failed to cite any judicial authority, and our independent research revealed none, that the Constitution mandates a 'presumption of life' instruction").

In opposing Sowell's request at trial, the State cited to the Eleventh District's holding in *State v. Davie*, 11th Dist. No. 2000-T-0104, 2001-Ohio-8813 that the Constitution "does not mandate that a death penalty defendant be given an instruction that he 'enjoys a presumption of life and the right to live.'" *Id.*, at *7. Sowell then attempts to portray the Eleventh District's opinion in *Davie* as somehow helpful to him because "*Davie* is absolutely clear that the presumption in fact exists." Merit Brief of Appellant, p. 85. While the *Davie* court indicated that such a presumption exists, the court found that a defendant has no right to a specific instruction referring to it as a "presumption." *Davie*, at *7. The trial court's instruction that the State had to prove the aggravating circumstances outweighed

the mitigating factors beyond a reasonable doubt "established a presumption in favor of life. But the law does not require that the specific instruction, which Davie claims should have been given, be given." *Id.* The United States District Court later agreed with the Eleventh District's holding that there was no right to a "presumption of life" instruction. *Davie v. Mitchell*, 291 F.Supp.2d 573, 622 (N.D. Ohio 2003). The Eleventh District was correct in *Davie* and this Court should adopt its reasoning in this case.

Sowell's argument is purely one of semantics. The trial court gave the jury the instruction that established a presumption in favor of life. Sowell is dissatisfied with this instruction because the trial court did not use the word choice he preferred. Sowell has no right to instructions that rephrase the law in a way to make it sound more favorable to him. The trial court correctly refused to give a non-statutory, non-constitutional instruction that could only have confused the jury. Sowell's Ninth Proposition of Law is without merit and should be overruled.

Proposition of Law X [As Stated By Appellant]: A Capital Defendant is Denied His Rights to a Fair Trial, a Jury Verdict, and Due Process, and Will Face Cruel and Unusual Punishment in Violation of His Rights as Secured by the Constitutions of the United States and the State of Ohio, and Ohio Statutes and Rules Are Violated When the Members of the Jury Are Not Required to Sign Verdict Forms Indicating That They Find the Defendant Guilty of the Charges and Specifications Against Him.

In his Tenth Proposition of Law, Sowell argues that the trial court erred by permitting the jurors to initial their verdict forms during the guilt phase, rather than writing out their full names. Each juror's initials on the forms were sufficient because a signature is simply whatever the signor intends for it to be. There was no suggestion in this case that any of the jurors did not sign the verdict forms. Sowell has also conceded that the jury was going to find him guilty regardless of anything that happened during the guilt

phase. He therefore cannot show prejudice simply because the jury signed their names differently than he would have preferred. Courts will not set aside a jury's verdict on a formality where it is clear what the jury intends. That intent was clear in this case.

1. The Jurors' Initials Are Sufficient to Constitute Their Signatures.

Both Crim.R. 31(A) and R.C. 2945.171 required that a jury's verdict be "signed." Neither of these defines what constitutes a signature. It is well-established, however, that a signature is generally whatever the signor intends for it to be. The Restatement (Second) of Contracts § 134 (1981) provides: "The traditional form of signature is of course the name of the signer, handwritten in ink. But initials, thumbprint or an arbitrary code sign may also be used; and the signature may be written in pencil, typed, printed, made with a rubber stamp, or impressed into the paper." Ohio courts have likewise adopted this definition of "signature" in permitting a grand jury foreperson to initial an indictment, rather than write out his full name. *State v. Payne*, 178 Ohio App.3d 617, 2008-Ohio-5447, 899 N.E.2d 1011, at ¶ 22 (9th Dist.). "Ohio courts have long recognized a signature by mark as legally valid where the signer intended to be so bound." *Id.*, citing *In re Young*, 60 Ohio App.3d 390, 393, 397 N.E.2d 1223 (9th Dist.1978).

There is no suggestion in this case that any of the jurors did not actually initial the verdict forms or that they did not intend their initials to function as a signature binding them to their verdicts. The trial court cured any possible error by polling the jurors after reading their verdicts in open court to ensure that they were, in fact, each juror's verdict. (Tr. 9465-9467). Every juror responded in the affirmative. The trial court also gave Sowell the opportunity to poll the jurors himself, which he declined. (Tr. 9467). Every juror therefore signed every verdict form using his or her initials and no error occurred. There is

no requirement, and Sowell identifies none, that a juror must write out his or her full name on a verdict form. The jurors signed all the forms as required.

2. Sowell Cannot Show Prejudice Where He Concedes That the Jury Would Have Inevitably Found Him Guilty in the Guilt Phase.

Even if the trial court's decision to permit the jurors to initial the verdict forms was improper, Sowell cannot demonstrate any prejudice. Sowell argues that allowing the jury to initial the verdict forms enabled them to skip through guilt phase deliberations more quickly, thus giving short shrift to "the seriousness of the task." Merit Brief of Appellant, p. 88. Sowell's argument is entirely speculative. It also contradicts major portions of his merit brief. Sowell has previously argued that "[t]he jury, any jury, would find Sowell guilty of the 22 counts of aggravated murder. The jury, any jury, would find Sowell guilty of at least one Course of Conduct specification for each aggravated murder." Merit Brief of Appellant, p. 43. Sowell cannot claim prejudice because by his own admission it was inevitable that the jury would have found him guilty regardless of how they signed the verdict forms. Sowell's entire Fifth Proposition of Law, in fact, is an argument that the jurors should have skipped past the guilt phase to get to mitigation. The trial court did require the jury to write out their names on the sentencing phase verdict forms, which prevented any prejudice to Sowell in that phase.

Ohio Courts have held in this context that a defendant must demonstrate some specific reason to doubt the validity of the initials as a signature to demonstrate prejudicial error. See *State v. Creasy*, 8th Dist. No. 65717, 65718, 2001 WL 1167121, *3 ("applicant has not identified facts in the record establishing that "MS" was not the signature of the foreperson"). In *State v. Walton*, 8th Dist. Nos. 44479 and 45223, 1983 WL 3082, the appellate court upheld the use of verdict forms that provided for only one set of signatures

to resolve multiple counts. "Crim.R. 31(A) requires that verdicts be in writing and signed by all jurors. No other specific form is mandated, and verdicts should not be rejected if their meaning is clear." *Id.*, at *6, citing *Norman v. State*, 109 Ohio St. 213, 222 (1924) (jury foreperson's signature of "C.T. Robinson" was valid where there was no question as to the identity of the juror). A jury's verdicts thus will not be rejected if their meaning is clear. *Id.* The meaning of every juror's signature is clear in this case and this Court should not invalidate the jury's verdicts.

Nor was any error structural in nature. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Courts will find structural error "only in a very limited class of cases." See *Johnson v. U.S.*, 520 U.S. 461, 468-469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (limiting such errors to (1) total deprivation of the right to counsel, (2) lack of an impartial trial judge, (3) unlawful exclusion of grand jurors of defendant's race, (4) the right to self-representation at trial, (5) the right to a public trial, (6) erroneous reasonable-doubt instruction to jury). Sowell does not claim that a jury using their initials as a signature is a structural error, and there are no cases supporting such a finding.

There was also a legitimate reason to permit the jurors to sign with their initials rather than requiring them to write out their full names. The jury in this case had to consider 82 counts during their deliberations after the trial court granted Sowell's Rule 29 motion as to 3 counts. The jury also had to deliberate as to 42 felony murder specifications and 286 course-of-conduct specifications. This would have been a total of 410 verdict forms that each juror had to sign, using his or her full name, one by one. The trial court did

not err by permitting the jurors to avoid a process that likely would have taken an exorbitant and unnecessary amount of time to complete. Sowell's Tenth Proposition of Law is without merit and should be overruled.

Proposition of Law XI [As Stated By Appellant]: It is Error and a Violation of a Capital Defendant's Rights Under the Constitutions of the United States and the State of Ohio for a Trial Court to Charge a Jury on More Than One Course of Conduct Specifications, R.C. 2929.04(A)(5) For Any Given Count of Aggravated Murder.

In his Eleventh Proposition of Law, Sowell argues that the trial court erred by failing to merge the 13 duplicative course-of-conduct specifications attached to each aggravated murder count in the indictment into one such specification for each victim. There was no error in this case because the trial court did merge the specifications in exactly the manner Ohio law requires prior to the beginning of the mitigation phase. This Court has repeatedly held that no error occurs when the trial court merges any duplicative course-of-conduct specifications prior to sentencing. There is no requirement that the merger occur prior to the guilt phase.

1. The Trial Court Merged All Duplicate Course-of-Conduct Specifications.

On July 22, 2011, the jury returned its verdict finding Sowell guilty of 81 counts and all death penalty specifications. The trial court announced that it would give the parties an additional week before proceeding to the start of the mitigation phase on August 1. (Tr. 9468). On Monday, July 25, 2011, Sowell filed a renewed motion to merge the course-of-conduct specifications for each victim. On Wednesday, July 27, 2011, still prior to the beginning of the mitigation phase, the State notified the trial court that it had no objection to Sowell's request:

MS. BELL: "Your honor, we filed one in opposition to the kidnapping specification convictions, but we are not

going to oppose the motion to merge the course of conduct specifications."

THE COURT: "I think it's clear from the *Mitts* case that the course of conduct for each victim will merge down to one course of conduct specification, and the jury will be so instructed."

(Tr. 9482-9483). The trial court instructed the jury on this merger at the opening of the mitigation phase: "Again, these course of conduct specifications, three through 15, they have been merged to one specification." (Tr. 9504). During its final instructions, the trial court again told the jury that "there are only one set of aggravating circumstances per victim. So that's what you consider." (Tr. 11489). The trial court thus complied with the mandates of this Court and merged all duplicative course-of-conduct specifications prior to sentencing.

2. This Court in *Jenkins* and *Mitts* Required Only That Such a Merger Occur Prior To the Beginning of the Mitigation Phase.

Sowell acknowledges that this merger occurred, but nevertheless claims that he was still prejudiced because the jury considered these duplicative counts during the guilt phase. Merit Brief of Appellant, p. 91-92. In every instance in which this Court has addressed this issue, it has held that the trial court must only merge duplicative specifications prior to the beginning of the mitigation phase. Even a failure to merge the specifications at that point may still be harmless error.

In *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), the first appeal of a death penalty case to this Court following Ohio's reintroduction of the death penalty in 1981, this Court stated that "Appellant recognizes that the presentation of overlapping aggravating circumstances at the guilt phase of a capital trial is allowable * * *." *Id.* at 195. *Jenkins* in turn relied upon the Supreme Court of California's decision in *People v. Harris*, 36

Cal.3d 36, 201 Cal.Rptr. 782, 679 P.2d 433 (1984), a case Sowell also cites. Merit Brief of Appellant, p. 91. *Harris*, however, also held that the merger requirement applies only to the mitigation phase. "The use *in the penalty phase* of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime * * *." *Id.* 201 Cal.Rptr. at 798 (emphasis added).

This Court later reaffirmed the distinction between merging duplicative specifications at the guilt and sentencing phases in *State v. Mitts,* 81 Ohio St.3d 223, 1998-Ohio-635, 690 N.E.2d 522. "Multiple course-of-conduct specifications are duplicative and must be merged *at the sentencing phase." Id.*, at 231 (emphasis added). Although this Court noted in *Mitts* that "such multiple course-of-conduct specifications should not even be included in an indictment," a trial court may cure any error by "instruct[ing] the jury in the penalty phase that those duplicative specifications must be considered merged for purposes of weighing the aggravating circumstances against the mitigating factors." *Id.*, quoting *State v. Garner*, 74 Ohio St.3d at 53, 656 N.E.2d 623. Even the failure to give that instruction at the sentencing phase can be essentially harmless and cured by this Court's independent reweighing. *Mitts*, at 231-232.

The Eighth District subsequently examined this Court's decisions in this area and found that *Jenkins* and *Mitts* "reveals that duplicative death penalty specifications must be merged at the sentencing phase. The cases cited above do not provide this court with any support for Ervin's argument that the trial court should have merged the specifications prior to the jury's deliberations of guilt * * *." *State v. Ervin*, 8th Dist. No. 88618, 2007-Ohio-5942, at ¶ 46. The State is unaware of any contrary precedent in this State or in any other

jurisdiction mandating the trial court to make such a merger prior to the guilt phase, and Sowell provides this Court with no such authority.

Finally, as Sowell acknowledges, jurors are presumed to follow their instructions. *Garner*, at 59. The trial court instructed the jury both at the beginning and at the end of the sentencing phase that the course-of-conduct specifications had merged down to one for each victim during sentencing. (Tr. 9504, 11489). Moreover, this was not simply a verbal instruction in the abstract because the verdict forms that the jurors considered in the second phase contained only one course-of-conduct specification in writing. The trial court was therefore unambiguous in its merger of the specifications and complied with this Court's decisions in *Jenkins* and *Mitts*. Sowell's Eleventh Proposition of Law is without merit and should be overruled.

Proposition of Law XII [As Stated By Appellant]: The "Principal Offender" and "Committed With Prior Calculation and Design" Alternatives in the R.C. 2929.04(A)(7) Specifications are Disjunctive, and If a Defendant is Charged With Both in a Single Specification, There Must Either Be An Election or the Jury Must Be Required to Reach a Unanimous Verdict As To One or the Other.

In his Twelfth Proposition of Law, Sowell argues that the instructions and verdict forms allowed the jury to improperly weigh both prior calculation and design and his principal offender status to determine the penalty. The trial court's instructions mirrored the language of R.C. 2929.04(A)(7) and referred to the "prior calculation and design" and "principal offender" alternatives as disjunctives. This Court has repeatedly held that this is all that is required under the law. Moreover, there was no possibility of prejudice to Sowell where he concedes there was no evidence to support anything other than a unanimous jury

finding that he was the principal offender in every aggravated murder. This Court can also cure any error through its independent reweighing process.

1. The Trial Court Correctly Instructed the Jury on the Felony-Murder Specification By Referring to the "Prior Calculation and Design" and "Principal" Offender Alternatives as Disjunctive.

At the close of the guilt phase, the trial court instructed the jury as follows regarding the felony-murder kidnapping specifications:

> "Before you can find the defendant guilty of one or both felony murder specifications, it must be proven beyond a reasonable doubt by the State of Ohio that the offense of aggravated murder as charged in count one was committed by the defendant Anthony Sowell while he was committing or attempting to commit or fleeing immediately after committing or attempting to commit, in specification one, kidnapping, in violation of Revised Code Section 2905.01(A(3) as it is defined in count three of the indictment and/or in specification two, kidnapping, in violation of Revised Code Section 2905.01(A)(4). And that's defined in count four.
>
> And either, A, the defendant was the principal offender in the commission of the aggravated murder, *or, B, if the defendant was not the principal offender,* the defendant committed the aggravated murder with prior calculation and design."

(Tr. 9047-9048) (emphasis added). The trial court's "use of the word 'or,' a disjunctive term, signifies the presence of alternatives." *In re Estate of Centrobi,* 129 Ohio St.3d 78, 2011-Ohio-2267, 950 N.E.2d 505, at ¶ 18; see also 1A Sutherland, Statutes and Statutory Construction (7th Ed. 2011) § 21:14 ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately"). The trial court's instruction, on its face, thus correctly informed the jury that they were to treat the "principal offender" and "prior calculation and design" alternatives in the felony-murder specification as disjunctive. The trial court's instruction also mirrored the precise language of R.C. 2929.04(A)(7):

> "The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

This Court has repeatedly approved jury instructions on the felony-murder specification that track the language of R.C. 2929.04(A)(7). "[A] trial court may instruct the jury on prior calculation and design and principal offender status disjunctively in the same specification, as the court did here." *State v. Burke*, 73 Ohio St.3d 399, 405, 1995-Ohio-290, 653 N.E.2d 242; *State v. O'Neal*, 87 Ohio St.3d 402, 416, 2000-Ohio-449, 721 N.E.2d 73 ("when the 'prior calculation and design' and the 'principal offender' language of R.C. 2929.04(A)(7) are charged disjunctively to the jury in a single specification, as was done in this case, no error is committed"), citing *State v. Cook*, 65 Ohio St.3d 516, 527, 605 N.E.2d 70 (1992). The trial court's use of the words "or, if not" are sufficient to convey that the options are disjunctive in nature. *State v. Twyford*, 94 Ohio St.3d 340, 351, 2002-Ohio-894, 763 N.E.2d 122 (emphasis in original), citing *O'Neal* at 415-416.

The trial court in this case gave the instruction that this Court approved in *Burke*, *O'Neal*, and in *Twyford*. The court listed the "principal offender" and "prior calculation and design" findings as alternatives set off by the words "or," "if," and "not." The court further labeled each option "A" and "B" to make the contrast even more clear. This Court has repeatedly approved the use of this phrasing and done so in the context of challenges to the inclusion of both alternative findings in the same specification. No error occurred.

2. Sowell Cannot Demonstrate Prejudice From the Lack of An Additional Instruction.

Sowell further argues that the trial court erred by not instructing the jurors that they must be unanimous in agreeing which of these alternatives Sowell was guilty of committing under the (A)(7) felony-murder specification. Sowell concedes that he failed to object to the lack of this instruction and thus waived all but plain error. Plain errors are obvious defects in proceedings resulting from a deviation from legal rules. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16. To prevail under a plain analysis, the appellant bears the burden of demonstrating that the outcome of the proceedings clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, paragraph three of the syllabus.

The outcome of Sowell's trial could not have been different but for the lack of this instruction because it could not have resulted in a prejudicial, non-unanimous finding of guilt as to either the "with prior calculation and design" or "principal offender" alternatives. Sowell argues that the jury's verdict may have been "patchwork" because they may not have been unanimous as to finding Sowell guilty of either alternative. Merit Brief of Appellant, p. 95. The record in this case, however, shows that the jury could not have considered the "prior calculation and design" alternative in the felony-murder specification.

Sowell cannot claim that the jury may not have been unanimous as to the "principal offender" alternative because there was no possibility at trial that any juror could have found that he was anything other than the principal offender in each murder. In *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, this Court found that a

defendant suffers no prejudice from the lack of an additional instruction that the jury must be unanimous as to the "principal offender" alternative where "no evidence suggested another offender." *Id.*, at ¶ 45, citing *State v. Chinn*, 85 Ohio St.3d 548, 558, 1999-Ohio-288, 709 N.E.2d 1166. Sowell has conceded in his merit brief that there was no evidence at trial to support any finding other than that Sowell was the principal offender for every murder:

> "Sowell was, at the relevant times, the only person actually living in the house, mostly on the third floor - where several of the bodies were recovered. There is no indication that anyone else had sufficient access to the property to have killed these women. Nor is there any reason to believe that anyone joined with Sowell in what he did to the women."

Merit Brief of Appellant, p. 42-43. Sowell thus cannot demonstrate that the jury was less than unanimous in finding that he was the principal offender in each aggravated murder. Where "[n]o evidence existed that suggested another offender * * * defendant's conviction could have been based only on his status as the principal offender." *State v. Nields*, 93 Ohio St.3d 6, 30, 2001-Ohio-1291, 752 N.E.2d 859, citing *Chinn* at 558.

The trial court instructed the jury that it was only to consider the "prior calculation and design" aspect of the felony-murder specification if they first found that "the defendant was not the principal offender." (Tr. 9048). Under *Chinn*, this Court presumes that the jury found Sowell was the principal offender where there was no basis whatsoever for any other finding in the record. The "prior calculation and design" aspect of the specification thus drops from consideration in sentencing. "Under these circumstances and because the jury was instructed on the principal offender and the prior calculation and design aspects of R.C. 2929.04(A)(7) in the disjunctive, there is no danger that the jury actually considered the prior calculation and design alternative of the R.C. 2929.04(A)(7) death penalty

specifications during its sentencing deliberations." *Chinn* at 558-559. Sowell's Twelfth Proposition of Law is without merit and should be overruled.

Proposition of Law XIII [As Stated By Appellant]: Ohio's Death Penalty Statute and Rules Violate the Fifth, Sixth, Eighth, and Fourteenth Amendments and the Right to a Jury Trial as Set Forth by the United States Supreme Court in Apprendi v. New Jersey and its Progeny Because They Do Not Permit a Capital Defendant Who Chooses to Accept Responsibility for His Crime to Plead Guilty and Have a Sentencing Determination Made by a Jury and Because They "Needlessly Penalize[] the Assertion of a Constitutional Right."

In his Thirteenth Proposition of Law, Sowell argues that R.C. 2929.03(D)(2), R.C. 2945.06, and Crim.R. 11(C)(3) are all unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona* 536 U.S. 584, 122 S.Ct. 2428, 153 L.E2d.2d 556 (2002), because they do not permit a defendant to waive his right to a jury trial for the guilt phase and then insist on a jury only for the penalty phase. This Court should not reach the merits of this argument because Sowell does not have standing to challenge an application of Ohio law that did not occur in his case. He also did not raise this issue at the trial court and thus forfeited his ability to challenge the constitutionality of these statutes on appeal. Finally, Sowell's argument is without merit because this Court found in *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 122-125 that a defendant has no right to a jury determination of his sentence after he pleads guilty.

1. Sowell Does Not Have Standing to Challenge the Constitutionality of Laws That Did Not Impact the Outcome of His Trial.

A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A party is limited to "assert[ing] his own legal rights and interests, and cannot rest his claim * * * on the legal rights or interests of third parties."

Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This is because "constitutional rights are personal * * *." *Broadrick* at 610. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id.*

Sowell does not have the ability to challenge the constitutionality of R.C. 2929.03(D)(2), R.C. 2945.06, and Crim.R. 11(C)(3) because none of these had any adverse impact on his own rights. Sowell's constitutional challenge is based on his claim that *Apprendi* and *Ring* require the State to give a defendant who enters a guilty plea to Aggravated Murder the right to a jury trial in the sentencing phase. Merit Brief of Appellant, p. 96. Sowell did not plead guilty and he did have the right to a jury trial at the sentencing phase. See *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, at ¶ 33 (defendant must attempt to plead guilty while requesting a jury for the penalty phase to preserve a constitutional challenge to Ohio's capital statute requiring jury waiver on appeal). Having ignored this procedure, Sowell has no standing to challenge these laws based on their hypothetical application to other defendants who choose to plead guilty and then request a jury be impaneled only for the penalty phase. Each of the laws he challenges were therefore constitutional as applied to him in this case.

2. This Court Reviews Only For Plain Error Because Sowell Forfeited This Issue by Failing to Raise it in the Trial Court.

Sowell waived any constitutional objection to that R.C. 2929.03(D)(2), R.C. 2945.06, and Crim.R. 11(C)(3) by failing to raise such a challenge in the trial court. "The question of constitutionality of a statute must generally be raised at the first opportunity and, in a

criminal prosecution this means in the trial court." *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and therefore need not be heard for the first time on appeal. *Id.*, paragraph one of the syllabus. Sowell never attempted to plead guilty in the trial court and request a jury for the penalty phase to preserve this issue for appeal, nor did he challenge the constitutionality of any of these laws under this claim. He therefore forfeited any constitutional objection.

This Court will consider a forfeited claim only under plain-error analysis. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶ 24. The test for plain error is stringent. A party claiming plain error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. This means that "the outcome of the proceedings clearly would have been different but for the error." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph two of the syllabus. If a forfeited error is not plain, a reviewing court need not examine whether the defect affects a defendant's substantial rights; the lack of a plain error ends the inquiry and prevents recognition of the defect. *Barnes* at 28.

3. A Criminal Defendant Has No Constitutional Right to Insist on a Jury to Determine Sentencing Enhancements After the Defendant Has Voluntarily Pleaded Guilty.

Pursuant to this Court's decision in *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, any error could not have been obvious. Under *Ketterer*, a defendant who makes a knowing, intelligent, and voluntary guilty plea, and thereby waives his right to

a jury trial, also waives his right to have a jury make any recommendation at sentencing. *Id.*, at ¶ 123. "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Id.*, citing *U.S. v. Ruiz*, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002). This Court has also granted a Writ of Prohibition against a trial court judge who attempted to create a hybrid procedure involving a jury only at the sentencing hearing. *Id.*, at ¶ 125, citing *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644. The judge in *Griffin* had "proceeded in a manner in which he patently and unambiguously lacked jurisdiction to act." *Id. Ketterer* is therefore dispositive of Sowell's claim.

Sowell's constitutional challenge to the framework of *Ketterer* is without merit. Federal courts have since reaffirmed that states can require a defendant to waive his right to have a jury determine his sentencing factors as a prerequisite to pleading guilty. "[N]either *Apprendi* nor *Ring* holds that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors." *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir.2010), *cert. denied*, ___ U.S. ___, ___, 131 S.Ct. 59, 177 L.Ed.2d 1148 (2010). *Apprendi* and *Ring* do not support Sowell's claim because the sentencing procedures challenged in both of those cases denied defendants the option of having a jury determine an aggravating factor regardless of whether the defendant pleaded guilty or not guilty to the charged offense. *Id.*, at 310. Ohio law, by contrast, requires a three-judge panel to determine a defendant's sentence only if the defendant first executes a knowing, intelligent, and voluntary right to a jury trial. *Apprendi* and *Ring* establish that it is permissive for judge to find aggravating circumstances, but that leaving that decision to the judge cannot be

required. It is never required in Ohio because a defendant always has the option to plead not guilty and insist on a jury verdict at sentencing.

Every defendant who pleads guilty in Ohio must engage in a colloquy with the trial court to ensure that the defendant understands he is giving up his right to have any question of fact determined by a jury. Every defendant who does so must affirmatively choose to have the judge or three-judge panel determine the sentence. Once a defendant has made that voluntary choice, neither *Apprendi* nor *Ring* creates any right to reverse course and insist on a new jury solely impaneled for sentencing. Such ability would effectively permit capital defendants to skip past the State's case at the guilt phase and proceed straight to their own mitigation testimony in front of a jury unfamiliar with the case and the aggravating circumstances. That practice is explicitly intended to minimize the fact-finding nature of the jury and instead to promote sentencing decisions based on shallow and one-sided examinations of the evidence. This Court properly reaffirmed that a defendant cannot have it both ways in *Ketterer* and should do so again in this case. Sowell's Thirteenth Proposition of Law is without merit and should be overruled.

Proposition of Law XIV [As Stated By Appellant]: A Capital Indictment Which Does Not Include a Determination by the Grand Jury That There is Probable Cause to Find That the Statutory Aggravating Circumstance or Circumstances in the Offense Outweigh the Mitigating Factors Cannot Be Used to Obtain a Death Sentence.

In his Fourteenth Proposition of Law, Sowell argues that Ohio's death penalty statute is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) because it does not require the grand jury to find probable cause in the indictment that the aggravating circumstances outweigh the mitigating factors. Sowell argues that the

jury's weighing determination at sentencing is a necessary "fact" of the offense that increases the potential punishment from life in prison to the death penalty. Sowell's argument is without merit because the weighing process in Sowell's trial was not a fact that increased the penalty for his offense. Sowell's request is also logically unworkable in application because the grand jury cannot meaningfully consider mitigating evidence before any defense investigation has been conducted.

1. The Jury's Subjective Weighing of the Aggravating Circumstances and Mitigating Factors is Not a "Fact" That Increases Sowell's Maximum Sentence.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, at 490. Aggravating circumstances are the functional equivalent of an "element" of capital murder and therefore must be found by a jury if the defendant has not waived his right to a jury trial. *Ring*, at 609. These decisions require the State to submit the aggravating circumstances to the jury and to prove them beyond a reasonable doubt before a death sentence may be imposed. Such facts must also be found by the grand jury and charged in the indictment. *U.S. v. Cotton*, 535 U.S. 625, 627, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) ("[i]n federal prosecutions, such facts must also be charged in the indictment"); Ohio Constitution, Article I, Section 10 ("no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury").

Sowell now argues that this Court should extend *Apprendi* and *Ring* to hold that the weighing of aggravating factors and mitigating circumstances itself is a fact that the grand jury must find and charge in the indictment. In other words, the grand jury must find that there is probable cause that the aggravating factors in the case outweigh the mitigating

circumstances beyond a reasonable doubt before a defendant may be eligible for the death penalty. Sowell's maximum sentencing exposure, however, is determined once the State proves at least one aggravating circumstance beyond a reasonable doubt. The weighing process that the jury must then engage in is not a "fact" that affects Sowell's exposure.

Ring requires only that "[i]if a State makes an increase in a defendant's authorized punishment contingent on [a] finding of fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." *Ring* at 602, citing *Apprendi* at 482-483. The jury's weighing of the aggravating and mitigating circumstances is not a "fact" that increases a defendant's maximum sentence to death. Rather, the jury only begins to weigh the aggravating and mitigating circumstances once it has found a statutory aggravating circumstance unanimously beyond a reasonable doubt. It is at that point, once the jury has unanimously found the defendant guilty of the aggravating specification, that the defendant's maximum sentence is increased to death. There is no additional increase when the jury engages in its weighing process. Accordingly, *Ring* does not apply to the jury's weighing of aggravating and mitigating circumstances.

Five federal appeals courts – the First, Fifth, Eighth, Ninth, and Tenth Circuits – have been unanimous in finding that the weighing process required by the Federal Death Penalty Act, 18 U.S.C.A. § 3591-3598, is not a "fact" that increases the penalty for a crime beyond the prescribed statutory maximum. See *U.S. v. Mitchell,* 502 F.3d 931, 993 (9th Cir.2007) (at the mitigation phase, the "jury's task is no longer to find whether factors exist; rather, each juror is to 'consider' the factors already found and to make an individualized judgment whether a death sentence is justified"); *U.S. v. Sampson,* 486 F.3d 13, 32 (1st Cir.2007) ("As other courts have recognized, the requisite weighing constitutes a process,

not a fact to be found. * * * The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party"); *U.S. v. Fields*, 483 F.3d 313, 345-36 (5th Cir.2007) ("the *Apprendi/Ring* rule should not apply here because the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves'"); *U.S. v. Barrett*, 496 F.3d 1079, 1107-1108 (10th Cir.2007) (adopting the Fifth Circuit's decision in *Fields* as "highly persuasive"); *U.S. v. Purkey*, 428 F.3d 738, 749 (8th Cir.2005) ("it makes no sense to speak of the weighing process mandated by 18 U.S.C. § 3593(e) as an elemental fact for which a grand jury must find probable cause. In the words of the statute, it is a 'consideration,' 18 U.S.C. § 3593(e), - that is, the lens through which the jury must focus the facts that it has found").

2. *Apprendi* Does Not Apply to Mitigating Evidence.

Sowell's argument also fails because requiring the grand jury to find probable cause that the aggravating factors outweigh the mitigating circumstances necessarily requires that the grand jury consider mitigating evidence. By its own terms, *Apprendi* does not apply to mitigating evidence. The Supreme Court has "often recognized [the distinction] * * * between facts in aggravation of punishment and facts in mitigation." *Apprendi*, at 490, f.n. 16. A trier-of-fact's consideration of a mitigating factor "neither expos[es] the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor * * * impos[es] upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme." *Id.* In *Ring*, the defendant likewise made "no Sixth Amendment claim with respect to mitigating circumstances * * *." *Ring*, at 597, f.n. 4.

Apprendi does not apply to mitigating factors and does not require the jury to find them at any phase of the proceedings. "If a fact increases the maximum penalty, it is an aggravating factor that must be submitted to the jury under *Apprendi.* If a fact decreases the maximum penalty, it is a mitigating factor that may be decided by the court." *U.S. v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 52 (1st Cir.2004). Ohio law therefore permits a trial court, following a recommendation of death by the jury, the unlimited ability to decide what is mitigating and how that mitigation should be weighed. The court owes no deference to any jury findings whatsoever. As a result, the requirements of *Apprendi* and *Ring* do not apply to mitigating evidence because they cannot increase the defendant's penalty. "The Supreme Court in *Apprendi* recognized that the existence of possible facts in mitigation does not affect the statutory maximum." *U.S. v. Hamlin*, 319 F.3d 666, 671 (4th Cir.2003).

Sowell wants the grand jury to conduct its own weighing process of the aggravating circumstances and mitigating factors. This would require the grand jury to consider mitigating factors, which "reduce, rather than increase, a statutory sentence." *U.S. v. Galan*, N.D. Ohio No. 3:06CR730, 2007 WL 2902908, at *1 (Oct. 2, 2007). Because *Apprendi* does not apply to mitigating circumstances, it does not require the jury or the grand jury to consider mitigation at any point. The grand jury cannot be required to weigh aggravating circumstances against mitigating factors if it is not required to consider mitigating factors at all.

3. It is Logically Impossible For the Grand Jury to Meaningfully Consider the Weight of Aggravating Circumstances Against Mitigating Factors.

Sowell's argument, if accepted, would also be impossible and logically incoherent in its application. There is no way for the grand jury to conduct any meaningful review of mitigating evidence or its weight before charging the defendant in the indictment. The

State presents its case to the grand jury before the defense has had any opportunity to conduct an investigation of the facts of the case to determine what mitigation exists. "[A] properly conducted capital trial can require *hundreds* of hours of investigation, preparation, and lengthy trial proceedings." *McFarland u. Scott,* 512 U.S. 1256, 1257, 114 S.Ct. 2785, 129 L.Ed.2d 896 (1994) (Blackmun, J., dissenting from denial of certiorari) (emphasis in original). Sowell's request would require cutting the entire defense investigation out of the process before the grand jury conducts its weighing.

Even if mitigating evidence was available at the time the grand jury issued the indictment, there is no way to present such evidence to the grand jury. The State cannot assume responsibility for presenting a defendant's mitigating evidence. "[T]he government has no obligation to bring target-favorable evidence into the grand jury room." *Galan,* at *2, citing *U.S. v. Williams,* 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). It is only the defendant and his attorneys who may decide what they want to present to the jury and argue as a mitigating circumstance. See R.C. 2929.03(D)(1) ("The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death"). The State has no role in that process and cannot reasonably be expected to guess what the defense will want to argue at the mitigation phase. *Galan,* at *2.

The only alternative would be to require the defense to appear before the grand jury and present mitigating evidence. This would turn the grand jury process into a full-scale preview of the defendant's mitigation before the State has actually proved any of its case and before either party has completed its investigation. It would also require the defendant to disclose his mitigation strategy to the State as early as the grand jury. This would be an enormous burden that the State anticipates almost no defendants would be

willing to bear. Sowell's own trial counsel attempted to shield every aspect of their mitigation-phase case for over a year after the indictment, saying, "who we're talking to and the areas that we're exploring, quite frankly, aren't the state's business, unless and until we're going to use them at trial, and then obviously we have to disclose, and we will." (Tr. 637). Such forced disclosure would be improper before the defendant has even been indicted. To present any compelling case to a grand jury, defense counsel would have to deliberately delay the indictment for months while they investigated the case, requiring the defendant be held without charges during the entire duration of that time.

Sowell cannot avoid these problems by saying that the grand jury does not have to consider mitigating evidence. Ohio law already requires the grand jury to find probable cause that the aggravating circumstances exist. Sowell's proposed requirement would go above and beyond that and mandate a finding of probable cause that they not only exist, but that they outweigh the mitigating factors. A weighing process, by definition, involves a comparison. The grand jury cannot weigh the aggravating circumstances against the mitigating factors if there are no mitigating factors before them to consider. Without any meaningful mitigating evidence before it, Sowell's proposed extension of *Apprendi* would turn the grand jury process into a sham in which it essentially rubber-stamps the State's presentation. That requirement would be meaningless and is not required by *Apprendi* or by any other case decided by any other court as of this writing. Sowell's Fourteenth Proposition of Law is without merit and should be overruled.

Proposition of Law XV [As Stated By Appellant]: The Universe of Cases To Be Examined for the Proportionality Review Required by R.C. 2929.05(A) Must Include at a Minimum All Cases in Which a Grand Jury Indictment Included a Death Specification Under R.C. 2929.04(A) in Order to Comport With the Clear Language of the Statute and With Due Process, the Right to Meaningful Appeal, and the Right to Avoid Cruel and Unusual

Punishment, as Those Rights Are Protected by the Constitutions of the United States and the State of Ohio.

In Sowell's Fifteenth Proposition of Law, he argues that R.C. 2929.05(A) unconstitutionally limits the proportionality review that Ohio courts must conduct in death penalty cases by not requiring them to consider all capitally-indicted cases that did not result in a death sentence. This Court has repeatedly and summarily rejected Sowell's argument and should do so again. Proportionality review is not constitutionally required and should not be expanded to the radical degree Sowell suggests. Considering cases in which a death sentence has not been imposed would unnecessarily distract from the issues in a given defendant's case.

1. There Is No Constitutional Right to Comparative Proportionality Review.

The Eighth Amendment does not require a court to compare a death sentence in the case before it with other penalties imposed in similar cases. *Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). A reviewing court is only required to conduct "an abstract evaluation of the appropriateness of a sentence for a particular crime." *Id.* The court's focus must remain on the defendant's culpability because "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Edmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

2. This Court Has Routinely Found R.C. 2929.05(A) to be Constitutional in Death Penalty Cases.

Although not mandated by the federal Constitution, R.C. 2929.05(A) requires an appellate court to determine whether a death sentence is excessive or disproportionate to

the penalty imposed in similar cases. In *State v. Steffen*, 31 Ohio St.3d 111, 123, 509 N.E.2d 383 (1987), paragraph one of the syllabus, this Court held that this statutorily required proportionality review is limited to the pool of case decided by the reviewing court where the death penalty was actually imposed. The mere fact that a grand jury has found probable cause that an aggravating circumstance exists does not justify comparing any such case to one in which a trier-of-fact has found that the aggravating circumstance outweighs any mitigating factors beyond a reasonable doubt. Death penalty convictions "are necessarily so qualitatively different from all others that comparison with non-capital offenses would be a profitless exercise." *Id.* at 123. A defendant cannot "prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey v. Kemp*, 481 U.S. 279, 307-308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (emphasis in original).

Sowell's proposed review is also unrealistic. Requiring a reviewing court to examine all cases in which the grand jury has simply attached a death penalty specification would multiply by several factors the number of cases a court must review. Further, any such review could not possibly accomplish what Sowell intends because the reviewing court would not have a full record of any aggravating or mitigating circumstances before it in cases that do not proceed to trial. "Comparison with cases not passed upon by the reviewing court would be unrealistic since the reviewing court could not possess the requisite familiarity with the particular circumstances of such cases so essential to a determination of appropriateness." *Steffen*, at 123.

This Court has routinely rejected identical challenges to R.C. 2929.05(A). *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 281; *State v. Were*, 118

Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶ 259. Sowell has offered this Court no reason to diverge from its well-established holdings in this area. Sowell's Fifteenth Proposition of Law is without merit and should be summarily overruled.

Proposition of Law XVI [As Stated By Appellant]: Cumulative Errors May Deprive a Criminal Defendant and Criminal Appellant of a Fair Trial and Due Process and Subject Him to Cruel and Unusual Punishment in Violation of His Rights Under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the Ohio Constitution.

In his Sixteenth Proposition of Law, Sowell claims that the cumulative effect of the errors set forth in his petition deprived him of his right to fair trial. In this case, as set forth above, there were no instances of error and therefore this Court cannot apply cumulative error to grant Sowell any relief.

"[A] conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal. The doctrine is not applicable to the case at bar as we do not find multiple instances of harmless error." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623. Thus, for cumulative error to apply, this Court must find multiple errors that did not rise to the level of prejudicial error. *State v. Marco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987).

As explained above, each of Sowell's other 17 propositions of law are individually without merit. Accordingly, there cannot be "cumulative error" and Sowell's Sixteenth Proposition of Law is without merit and should be overruled.

Proposition of Law XVII [As Stated By Appellant]: When a Criminal Defendant's Trial Counsel is Deemed to Have Waived or Failed to Preserve Issues He is Denied his Right to Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

In his Seventeenth Proposition of Law, Sowell argues that his trial counsel were ineffective for failing to raise and preserve three issues he believes were error during his trial. The State has already argued above that these issues are all meritless and there was therefore no deficient performance. Defense counsel is not required to raise every conceivable issue to preserve for appeal. Even if this Court were to find that at least one of these issues was meritorious, Sowell cannot establish prejudice because he cannot show a substantial likelihood that but for any of these alleged errors, he would have received a life sentence.

1. Legal Standard for Ineffective Assistance Claims.

A defendant must satisfy a two-prong test to succeed on a claim of ineffective assistance. The defendant must demonstrate (1) "that counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense so serious[ly] as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. The first prong asks this Court to consider whether trial counsel's decisions fell outside the wide range of reasonable professional assistance. *State v. Awkal*, 76 Ohio St.3d at 337, 1996-Ohio-395, 667 N.E.2d 960. The second prong requires a defendant to demonstrate a "substantial, not just conceivable" that he would have obtained a different result at trial but for trial counsel's unprofessional errors. *Harrington v. Richter*, 131 S.Ct. at 791, 178 L.Ed.2d 624.

2. Sowell Cannot Demonstrate Ineffective Assistance Where Counsel Elected Not To Raise Meritless Issues at Trial.

Sowell claims that his trial counsel were constitutionally ineffective because they failed to raise and preserve three issues: the inclusion of both the "principal offender" and "prior calculation and design" alternatives in the felony-murder specifications of the indictment and to request an instruction on unanimity as to one or the other (Sowell's Twelfth Proposition of Law), the failure to object to the rape charges in counts 72, 73, 78, and 79 (Sowell's Fourth Proposition of Law), and the admission of victim-impact evidence during the guilt phase (Sowell's Sixth Proposition of Law).

Initially, Sowell's trial counsel did object to the admission of what he considered to be victim-impact testimony during the guilt phase. (Tr. 6360). This Court should therefore analyze Sowell's ineffectiveness claim only in light of trial counsel's failure to object to the issues Sowell raises in his Twelfth and Fourth Propositions of Law.

The State has argued above that Sowell's underlying argument in each of these propositions is without merit. Further, the mere failure to object and preserve these two issues in the context of a trial that lasted ten weeks is not deficient performance. To be constitutionally effective, "[c]ounsel need not raise meritless issues or even all arguably meritorious issues." *State v. Taylor*, 78 Ohio St.3d 15, 31, 1997-Ohio-243, 676 N.E.2d 82. Ineffectiveness claims depend on whether the defendant received a fair trial, not "the quality of legal representation" as a general matter. *Strickland* at 689.

Sowell has failed to demonstrate the absence of a strategy or other legitimate explanation for counsel's approach. Sowell's trial counsel actively contested the State's case at every phase of the proceedings. They extensively cross-examined the State's witnesses, made relevant objections throughout the trial, were active in all of the pretrial conferences for a period of 19 months prior to trial, conducted a thorough voir dire of 200

members of the jury venire, and delivered a cogent closing argument during the mitigation phase. Counsel objected at numerous points throughout Sowell's trial to preserve issues they felt were meritorious, for example making 21 separate objections during the State's final closing argument. (Tr. 11526-11545). Sowell concedes in his merit brief that his trial counsel secured "unprecedented financial resources to investigate the facts of the crimes and to investigate possible mitigation." Merit Brief of Appellant, p. 43. At trial, they presented the jury "with a wealth of mitigation evidence to consider." Merit Brief of Appellant, p. 95.

"[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v.* Richter, 131 S.Ct. at 791, 178 L.Ed.2d 624. Sowell must show that the two propositions he raises in which his counsel did not object were "sufficiently egregious and prejudicial" as to create a substantial probability that he would have received a life sentence but solely for those two errors. *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). He cannot meet that high burden. Not only were these not errors, but they could not have been a source of any prejudice to Sowell if they were. This Court's prejudice inquiry depends on the strength of the evidence in a given case. A verdict strongly supported by the record is less likely to have been affected by errors than one with weak record support. *Strickland*, at 696. The evidence in this case was overwhelming in favor of both guilt and death at every point. Sowell's Seventeenth Proposition of Law is without merit and should be overruled.

Proposition of Law XVIII [As Stated By Appellant]: Ohio's Death Penalty Law Violates the U.S. Constitution and International law.

In his Eighteenth and final Proposition of Law, Sowell argues that the death penalty in Ohio violates the U.S. Constitution and various provisions of international law. This Court has previously rejected all of these arguments and should do so in this case.

1. Ohio's Death Penalty is Not Being Administered in an Arbitrary and Unequal Manner.

Sowell first argues that Ohio's death penalty scheme is arbitrary and that it is administered in a racially discriminatory manner. This Court has repeatedly rejected this argument. See *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 11, at ¶ 139; *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, at ¶ 103; *State v. Steffen,* 31 Ohio St.3d at 124-125, 509 N.E.2d 383; *State v. Jenkins,* 15 Ohio St.3d at 168-169, 473 N.E.2d 264.

2. Ohio's Death Penalty Sentencing Procedures are Sufficiently Reliable.

Sowell argues that Ohio's death-penalty scheme is unconstitutional because of unreliable sentencing procedures. This Court has previously rejected this argument and thus, should continue to follow its precedents and reject Appellant's argument. See *State v. Ferguson,* 108 Ohio St.3d 451, 2006-Ohio-1502, at ¶ 87; *State v. Esparza,* 39 Ohio St.3d 8, 12-13, 529 N.E.2d 192 (1988); *State v. Stumpf, 32* Ohio St.3d at 104, 512 N.E.2d 598; *State v. Jenkins,* 15 Ohio St.3d at 172-173, 473 N.E.2d 264.

3. It is Not Unconstitutional to Require Submission of a PSI or Mental Health Evaluation to the Trier-of-Fact if a Defendant Chooses to Request Them.

Sowell argues that Ohio's capital statutes are unconstitutional because they require submission of the presentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. This Court has previously rejected Sowell's

argument in *State v. Buell,* 22 Ohio St.3d 124, 489 N.E.2d 795 (1986). In *Buell,* this Court held that pursuant to R.C. 2929.03(D)(1), "the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. There is no constitutional infirmity in providing the defendant with such an option." *Id.,* at 138; see also *State v. Esparza,* 39 Ohio St.3d at 10, 529 N.E.2d 192.

4. Ohio's Felony-Murder Death Specification in R.C. 2929.04(A)(7) Genuinely Narrows the Class of Persons Eligible for Death.

Sowell argues that R.C. 2929.04(A)(7), the felony-murder death penalty specification, fails to narrow the class of individuals eligible for the death penalty because it is duplicative of the felony-murder statute in R.C. 2903.01(B). This Court rejected Sowell's argument in *State v. Jenkins,* 15 Ohio St.3d at 168-169, 473 N.E.2d 264. In *Jenkins,* this Court upheld the death sentence of a defendant convicted of felony murder pursuant to R.C. 2903.01(B) and sentenced in accordance with R.C. 2929.04(A)(7). *Jenkins* at 164. In affirming the conviction, this Court stated that "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option." *Id.,* at 178.

More recently, in *State v. Fry,* 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, this Court again rejected Sowell's argument and noted that the United States Supreme Court had also rejected the claim that a felony-murder death specification does not sufficiently narrow the class of those eligible for the death penalty. *Id.* at ¶ 185, citing *Lowenfield v. Phelps* (1988), 484 U.S. 231, 108 S.Ct. 546, 98 L.E.2d 568; see also *State v. Bryant,* 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 55 ("The narrowing

requirement may occur at either the guilt phase or the sentencing phase of a capital trial but need not occur at both")." *Fry,* at ¶ 184.

5. R.C. 2929.03(D)(1) is Not Unconstitutionally Vague.

Sowell next argues that R.C. 2929.03(D)(1) is unconstitutionally vague because it gives the sentencer unfettered discretion to weigh "the nature and circumstances of the offense" – a statutory mitigating factor under R.C. 2929.04(B) – as an aggravator. In *State v. McNeill* (1998), 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998), this Court held that "the 'nature and circumstances of the aggravating circumstances' referred to in R.C. 2929.03(D)(1) are separate and distinct from the 'nature and circumstances of the offense' referred to in 2929.04(B)." *Id.* at 453, citing *State v. Gumm*, 73 Ohio St.3d 413, 416-423, 653 N.E.2d 253 (1995). See also *Tuilaepa v. California*, 512 U.S. 967, 973-980, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (California death penalty special circumstance, which requires sentencer to consider circumstances of crime of which defendant was convicted in present proceeding and existence of any special circumstances found to be true, is not unconstitutionally vague). It is logical to find that the nature and circumstances of the offense can be either aggravating or mitigating depending on the case.

6. Ohio's Proportionality and Appropriateness Review Are Constitutionally Sufficient.

Sowell argues that the appropriateness analysis and proportionality review of R.C. 2929.05(A) is constitutionally infirm. This Court has repeatedly rejected this same argument. "The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen,* 31 Ohio St.3d 111, 509 N.E.2d 383, paragraph one of the syllabus. This Court has continued to uphold the constitutionality of R.C. 2929.05(A) in the years

since *Steffen*. See *State v. Short*, Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 11, at ¶ 140; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶ 381; *State v. Lamar*, *95* Ohio St.3d 181, 2002-Ohio-2128, at ¶ 23.

7. Ohio's Death Penalty System Does Not Violate International Law.

Sowell argues that Ohio's death penalty scheme violates international law. First, as the State has previously demonstrated in subsections 1 through 6 above, Ohio's death penalty statutory scheme does not allow for arbitrary and unequal treatment in punishment. Thus, Ohio's death penalty statutory scheme is constitutional and is not cruel and unusual punishment.

Second, Ohio's death penalty statutory scheme does not violate international law:

> "The Sixth Circuit has explained that international law agreements and treaties to which the United States belong (such as the International Covenant and Charter of the Organization of American States) do not prohibit the death penalty. *Buell v. Mitchell* (C.A.6, 2001) 274 F.3d 337. `Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.' Id. at 371. The effect of this reservation is that United States courts are not bound by international law on the issue of capital punishment where the death penalty is upheld as constitutional.
>
> "In *State v. Williams,* we discussed the application and effect of international law on death penalty issues, and quoted the Fifth Circuit for the proposition that `[h]ow these issues are to be determined is settled under American Constitutional law. Not a single argument is advanced directed to proving that the United States in these international agreements agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court.' Butler App. Nos. CA91-04-060, CA92-06-110, [1992 WL 317025], 19, citing *Celesteine v. Butler* (C.A.5, 1987), 823 F.2d 74, 79-80, certiorari denied (1987), 483 U.S. 1036, 108 S.Ct. 6.
>
> "The *Buell* Court specifically noted that in relation to the International Covenant's Article VII, `the United States agreed to abide by this prohibition only to the extent that the Fifth Eighth, and Fourteenth Amendments ban cruel and unusual punishment.' 274 F.3d 371. As we have previously determined that the years Davis has spent on death row do not constitute

cruel and unusual punishment, his challenge under the guise of international law must also fail."

Davis, 12th Dist. No. CA2009-10-263, 2011-Ohio-787, at ¶¶ 124-126.

In addition, while the United States is a party to the International Covenant on Civil and Political Rights ("ICCPR"), the U.S. government and its constituent states are not necessarily required to enforce the provisions of the treaty as binding federal law. During the United States' ratification process of the ICCPR, the U.S. specifically stated that the treaty would not be self-executing and that its provisions cannot be enforced in U.S. courts absent enabling legislation. *Commonwealth v. Judge,* 591 Pa. 126, 132-133, 916 A.2d 511 (2007), citing generally 138 Cong. Rec. S4781, S4783; see also Restatement (Third) of the Foreign Relations Law of the United States Sec. 111(4)(b) (1987) (treaties are non-self-executing "if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation"). To date, Congress has not enacted any such law with regard to the ICCPR. *Sosa v. Alvarez-Machian,* 542 U.S. 692, 728, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).

Similarly, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") subjection to multiple reservations, and declared specifically that the treaty is not self-executing. *Sarei v. Rio Tinto, PLC,* 671 F.3d 736, 768-769 (9th Cir.2011). While this Court has not apparently ruled on an ICERD-based challenge to the death penalty statute, Sowell's argument should be rejected on the same grounds as his claim under the ICCPR. Moreover, Sowell has simply failed to demonstrate the truth of his premise that Ohio's death penalty is racially discriminatory and therefore cannot prevail under an ICERD challenge on the merits.

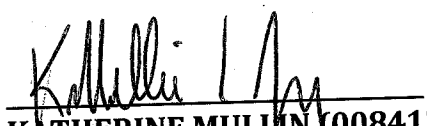
Finally, this Court has consistently rejected claims where customary international law is used as a defense against an otherwise constitutional action. *State v. Jones*, --- Ohio St.3d ---, 2012-Ohio-5677, --- N.E.2d ---, at ¶ 209; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-257, 71 N.E.2d 865, at ¶ 226. This Court should follow its repeated and unanimous precedents in this area and summarily reject all of Sowell's claims under his Eighteenth Proposition of Law.

CONCLUSION

Based on the foregoing, the State of Ohio respectfully requests that this Honorable Court affirm Anthony Sowell's convictions and death sentences.

Respectfully submitted,

TIMOTHY J. McGINTY (0024626)
CUYAHOGA COUNTY PROSECUTOR



KATHERINE MULLIN (0084122)
KRISTEN SOBIESKI (0071523)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 698-7919
(216) 443-7806 *fax*
kemullin@cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Merit Brief of Appellee State of Ohio* was sent via ordinary U.S. Mail, postage prepaid this 8th day of March, 2013, to:

JEFFREY M. GAMSO, ESQ.
1119 Adams St., 2nd Floor
Toledo, OH 43604
(419) 213-3800

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: ERIKA CUNLIFFE, Esq.
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44114
(216) 443-7583

Counsel for Defendant-Appellant

KATHERINE MULLIN (0084122)
KRISTEN SOBIESKI (0071523)
Assistant Prosecuting Attorneys